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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

CISCO SYSTEMS, INC., ET AL.,)

Plaintiffs,)

VS.)

SHAHID H. SHEIKH, ET AL.,)

Defendants.)

ADVANCED DIGITAL SOLUTIONS)

INTERNATIONAL, INC.,)

Third-Party Plaintiff,)

VS.)

RAHI SYSTEMS, INC., ET AL.,)

Third-Party Defendants.)

NO. C-18-7602 YGR

FRIDAY, OCTOBER 16, 2020

OAKLAND, CALIFORNIA

PRETRIAL CONFERENCE

REPORTER'S TRANSCRIPT OF ZOOM PROCEEDINGS

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(Appearances Continued)

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Official Court Reporter

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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1 Friday, October 16, 2020

1:00 p.m.

2 P R O C E E D I N G S

3 oOo

4 **THE COURT:** Okay. Good afternoon, everyone. Let's
5 go ahead and call their case.

6 **THE CLERK:** Calling Civil Action 18-7602 Cisco
7 Systems, Inc. versus Sheikh, et al.
8 Counsel, please state your appearances.

9 **MR. NELSON:** Good afternoon, Your Honor. Richard
10 Nelson for the plaintiffs Cisco Systems and Cisco Technology.
11 I am accompanied by Ian Boyd and Angela He.

12 **THE COURT:** Okay. Good afternoon.

13 **MR. ATKINSON:** Good afternoon, Your Honor. Tyler
14 Atkinson with McManis Faulkner on behalf of the defendant,
15 third-party plaintiff ADSI, and defendants PureFutureTech, K&F
16 Associates, Shahid Sheikh, Kamran Sheikh, and Farhaad Sheikh.
17 With me also is my colleague, Andrew Parkhurst.

18 **THE COURT:** Okay. Good afternoon.

19 **MR. CROSBY:** Good afternoon, Your Honor. Michael
20 Crosby on behalf of defendants Jessica Little and Imran
21 Husain.

22 **THE COURT:** Okay. Good afternoon.

23 **MR. KIRKE:** Good afternoon, Your Honor. John Kirke
24 with Kathleen Friend for the third-party defendant Nabia
25 Uddin.

1 **THE COURT:** Okay. Good afternoon.

2 All right. We have a lot of things to do today. So let's
3 get started.

4 Given my order on summary judgment, I suspect a number of
5 things have changed in terms of your trial prep. I'll let you
6 know right off the bat I'm still trying to get you out. You
7 are trailing a criminal action so the November 2nd trial date
8 is continued one week to November 9th.

9 There will be two points in time that I will know whether
10 or not I can get you out on the 9th. The first is
11 October 27th. Sometime on October 27th, I will find out --
12 that is our weekly check-in with respect to COVID issues. I
13 will find out whether a jury pool is coming in or not. If it
14 is not, then it will be continued. If it is, then you trail.

15 The case in front of you is a criminal case. It is
16 supposed to go out November 6, Friday. If it does not go out
17 November 6, you will go out Monday, November 9th. So you
18 won't know until that Friday. If I cannot get you out on
19 November 9th, the case is continued for jury selection on
20 January 7th, 2021.

21 Okay? If I can't get you out January 7th, who knows.

22 All right. We're going to go through -- I have your
23 filings, but I also have your binders. We are going to do
24 this in the sequence of the binder.

25 The proposed order regarding stipulations is in order, and

1 that order will be entered at Docket 235.

2 With respect to your witness list, Docket 236, in light of
3 the summary judgment order, are there any updates to 236?

4 **MR. ATKINSON:** Not for defendants, Your Honor.

5 **MR. NELSON:** Richard Nelson for the plaintiffs.

6 There is no change due to third-party defendants.

7 **THE COURT:** Mr. Kirke?

8 **MR. KIRKE:** Yes, Your Honor.

9 And part of our witness list also depends on the rulings
10 with respect to the Fifth Amendment issues, but we are only
11 calling for the third-party defendants Nabia Uddin and
12 possibly Karoline Banzon. But I note that other previous
13 third-party defendants remain on the defendants' witness list.

14 **THE COURT:** Who is the second person you said?

15 **MR. KIRKE:** Karoline Banzon.

16 **THE COURT:** Okay.

17 **MR. KIRKE:** She remains on the witness list, but I --
18 at least as far as what the third-party defendant would put
19 on, our estimate is -- is probably no more than a half hour
20 for her.

21 **THE COURT:** Okay. So you're withdrawing then from --
22 from your affirmative case, Theresa Lau, Danny Dass, Shahid
23 Sheikh?

24 **MR. KIRKE:** No, Your Honor. We were -- I'm sorry I
25 wasn't clear.

1 We are withdrawing our third party -- the other -- the
2 previous third-party defendants who we previously had on our
3 witness list with the exception of Ms. Banzon and Ms. Uddin.

4 **THE COURT:** Okay.

5 **MR. KIRKE:** If it please the court, we could
6 circulate, and update, and submit that to the Court --

7 **THE COURT:** I just want to strike them from my list.
8 Do you have Docket 236? Yours begin at page 9?

9 **MR. KIRKE:** Yes, Your Honor, I have that.

10 As of right now, the witnesses we will be withdrawing, I
11 believe, start on page 10 at the bottom, Mr. Minhas. And
12 going on to the next page, Mr. Karamat, Ms. Nguyen, and
13 Mr. Raisonni.

14 However, those, with the exception of Ms. Nguyen, remain
15 on the defendants' witness list.

16 **THE COURT:** I understand. I look at the time
17 estimates as part of my calculation. All right.

18 So Minhas is withdrawn, affirmatively, Karamat withdrawn,
19 Nguyen is withdrawn, and Raisonni is withdrawn, right?

20 **MR. KIRKE:** Yes. Thank you, Your Honor.

21 **THE COURT:** Any other changes to the witness list?

22 (No response.)

23 Hearing none --

24 **MR. CROSBY:** Excuse me, Your Honor, one moment. I
25 have to plug in my computer, but please keep proceeding. I

1 apologize.

2 **THE COURT:** All right, Mr. Crosby.

3 So you were limited to calling the witnesses on this list
4 as currently amended. That's Docket 236. You cannot call any
5 other witnesses unless the Court so orders and upon a showing
6 of good cause. And that doesn't relate to experts, just
7 percipient. Okay.

8 237, experts. Any changes I should know about? I know we
9 have a couple of motions with respect to the experts.

10 **MR. NELSON:** Your Honor, this is Richard Nelson for
11 the plaintiffs.

12 I have just been informed that one of my experts, Sam
13 Gupta, who is a nonretained expert, may be leaving Cisco. I
14 haven't had a chance to talk with him. But initially I knew
15 that that was a possibility just last week, and he confirmed
16 that he would still testify even if he was no longer at Cisco.

17 So the plan would be, if we go forward on the November
18 date, I suspect that Sam Gupta will be our witness. If it
19 gets pushed to January, we may need to substitute that he be a
20 witness. Of course I would give the defendants and the
21 third-party defendant an opportunity to depose that new expert
22 witness if I have to replace him.

23 **THE COURT:** Okay. Why don't we go ahead, since we
24 are on experts, and talk about the motions with respect to the
25 experts.

1 First, with respect to the motion with respect to
2 Mr. Russell Mangum, and as I understand it, it is only his
3 opening report that is being challenged, correct?

4 **MR. BOYD:** This is Ian Boyd for Cisco.

5 That's correct, Your Honor.

6 **THE COURT:** All right.

7 I am inclined to grant the motion. I've read the report.
8 It's, in many ways, just a hypothetical opening. It doesn't
9 really address anything specific about the case, it just
10 hypothesizes. And because of that I don't know that if I
11 strike it there's any prejudice whatsoever given that all of
12 his real opinions are in his Rebuttal Report.

13 Response.

14 **MR. ATKINSON:** Your Honor, this is Tyler Atkinson for
15 the defendants.

16 We don't necessarily agree with the Court on that. Our
17 view, in the sense it's mooted --

18 **THE COURT:** Pull it up, 132-2, and tell me what it is
19 that you want from this report.

20 **MR. ATKINSON:** Your Honor, just to be clear, I'm
21 saying we don't necessarily disagree with the Court. In other
22 words, I'm not saying --

23 **THE COURT:** Your double negative is you agree with
24 me?

25 **MR. ATKINSON:** Your Honor, we didn't bring the motion

1 and we are not the Court, so we are kind of in an awkward
2 position there.

3 Our view is, the issues that we want to bring to the
4 jury's attention are embraced by the Rebuttal Report. And so
5 in that sense, we thought the motion was just moot because of
6 the fact that we don't intend to call Mr. Mangum without him
7 responding to the testimony of the experts.

8 And I am sorry, Your Honor, I don't mean to consume the
9 Court's time on this point.

10 **THE COURT:** Okay. Well, you didn't withdraw it, so
11 anyhow, the motion is granted.

12 The opinions expressed in the opening report are stricken
13 and cannot be used at trial. If there are identical opinions
14 in the Rebuttal Report, which was not challenged, then those
15 are fine. But if it comes just from the opening -- and I
16 haven't -- the reason I say that is I have not read the
17 rebuttal because that wasn't part of the motion. I only read
18 the opening and found nothing of real substance for purposes
19 of the trial.

20 So do I need to be more clear given that I haven't read
21 the rebuttal? Are there any questions that you may have?

22 **MR. ATKINSON:** And Your Honor, this is Tyler Atkinson
23 for the defendants again.

24 This is where my concern comes because I understand the
25 Court saying, okay, Mr. Expert, you are barred from testifying

1 to X, Y, and Z, which is found in the initial report. Where
2 this could become arguably problematic is, if it is in the
3 Rebuttal Report, I'm concerned we are going to end up with
4 sort of a pitched battle about, well, the judge said this
5 can't come in, and then we have to show, no, it is all in the
6 Rebuttal Report.

7 I don't know if it would help the Court to review the
8 Rebuttal Report. I believe we included it with our opposition
9 to the motion. I would have to check on that.

10 **THE COURT:** Well, is -- that's why I'm asking,
11 Mr. Atkinson.

12 What -- I am not striking the opinions that are in the
13 Rebuttal Report. All right. Do we really have to spend a lot
14 of time on this, folks? Is there any confusion whatsoever
15 about what's happening?

16 Mr. Boyd?

17 **MR. BOYD:** No, Your Honor, no confusion. We don't
18 need to spend any more time on this from Cisco's perspective.

19 **THE COURT:** All right. Hopefully we won't be wasting
20 time in the trial. If it's in the Rebuttal Report, he can
21 talk about it.

22 **MR. ATKINSON:** Thank you, Your Honor.

23 **THE COURT:** The next one is with respect to Mr. Levy
24 and Mr. Regan.

25 With respect to those, I am inclined to deny the motion.

1 You know, I didn't see in the motions that there was really a
2 challenge that comes within the confines of *Daubert*. It's
3 more of an objection to the substance of the opinions, and
4 that goes to weight not admissibility.

5 So does anyone want to argue? If not, that's the ruling.

6 (No response.)

7 Hearing none, I'll deem it submitted and those motions are
8 overruled.

9 Okay. The next tab in your binder -- and, actually, it
10 wasn't in the binder. I have this humongous stack of
11 discovery excerpts. But am I right, are there no -- you all
12 figured this out and there's nothing for me to resolve?

13 I didn't see any motions. I didn't see any disputes over
14 designations.

15 **MR. NELSON:** Thank you, Your Honor. This is Richard
16 Nelson for the plaintiffs.

17 There is no motion with regard to the Exhibit List. The
18 Exhibit List is Document 238. It was filed.

19 Your Honor, I -- what I would like to bring to the Court's
20 attention, the Court's standing order advised the parties to
21 meet and confer in good faith to try to resolve admissibility
22 issues.

23 **THE COURT:** Yes.

24 **MR. NELSON:** Specifically -- so the stipulation to
25 admit certain documents or at the very least to stipulate to

1 the authenticity of the documents.

2 **THE COURT:** Right.

3 **MR. NELSON:** What the plaintiffs did, and actually
4 the third-party defendants as well, we very carefully went
5 through every document. And I haven't counted them up, Your
6 Honor, but probably 95, 97 percent of defendants' documents we
7 have agreed that they are not only foundationally authentic,
8 but that we stipulate to the admissibility.

9 So we were very careful -- there's a few that we don't
10 stipulate to admissibility, but the vast majority we have done
11 that.

12 For each and every one of plaintiffs' exhibits, and I
13 think third-party defendants' exhibits, defendants have
14 refused to either agree to the authenticity or to stipulate to
15 admissibility.

16 And I think, Your Honor, it's really abusive in the
17 sense --

18 **THE COURT:** Let me find out about that.

19 Mr. Atkinson, I see that and then I noted it as I was
20 preparing. Why is that?

21 **MR. ATKINSON:** Your Honor, I believe this is
22 something Mr. Parkhurst was going to address with the court.

23 **THE COURT:** All right. Mr. Parkhurst, why is that?

24 **MR. PARKHURST:** Yes, Your Honor.

25 I mean, a few things. We also carefully looked at these

1 exhibits that our opposing parties have put on the list.

2 **THE COURT:** Let's take a look at Exhibit 1.

3 What is that exhibit?

4 **MR. NELSON:** Trademark -- I'm sorry.

5 **COURT REPORTER:** I'm sorry. I didn't understand
6 that.

7 **MR. NELSON:** I apologize, Madame Court Reporter.
8 This is Rick Nelson.

9 I was actually answering the question, but then I stopped
10 myself because I think the Court was addressing it to
11 Mr. Parkhurst.

12 **THE COURT:** So it says description TM 1,542,339.

13 What is that?

14 **MR. NELSON:** This is Richard Nelson. I guess I will
15 answer that, Your Honor.

16 It's the trademark at issue. So this is the copy from the
17 PTO which has been certified.

18 **THE COURT:** All right. What's the problem with that
19 document, Mr. Parkhurst?

20 **MR. PARKHURST:** So, yeah, Your Honor, I think the --
21 the issue that we raise -- we certainly understand that this
22 is a document produced by the Trademark Office. However, our
23 position is, given the potential for criminal liability in
24 this case, given all --

25 **THE COURT:** What does criminal liability have to do

1 with admissibility? What rule of evidence does not allow for
2 the admissibility of this document?

3 Mr. Parkhurst?

4 **MR. PARKHURST:** Your Honor --

5 **THE COURT:** Give me rule number.

6 **MR. PARKHURST:** Your Honor, it's about creating a
7 record, Your Honor. We believe we owe a duty to our client.
8 Given the potential for criminal liability, we can't be
9 creating a record of stipulations and admissibility and
10 things --

11 **THE COURT:** I need an evidentiary basis for your
12 objection.

13 **MR. PARKHURST:** Your Honor, our position simply is,
14 we won't stipulate to the admissibility. Foundation and
15 authenticity are the objection as well as hearsay, the
16 document is hearsay. We certainly understand that the Court
17 may find that those objections are overruled and that the
18 document is admissible --

19 **THE COURT:** Okay. This is what we are going to do,
20 Mr. Parkhurst, to make it easier for you and your client.

21 You are going to make those objections at trial, and all
22 of those objections are going to count against your time.

23 **MR. PARKHURST:** Understood, Your Honor.

24 **THE COURT:** So you understand that? That means you
25 are going to waste three to four hours of a limited clock to

1 these objections.

2 **MR. PARKHURST:** Understand, Your Honor.

3 **THE COURT:** Are you sure you want to do that?

4 **MR. PARKHURST:** Your Honor, I would just return,
5 again, to our position about stipulating and establishing that
6 record of stipulating to documents, to their authenticity, to
7 their foundation. I think that that is our position on that.

8 **MR. ATKINSON:** Your Honor, this is Tyler Atkinson.

9 **THE COURT:** What's the problem with the foundation?
10 This is a certified document.

11 **MR. PARKHURST:** Understood, Your Honor. This may be
12 a situation where the Court certainly finds that this is an
13 admissible --

14 **THE COURT:** Mr. Parkhurst, you have a Rule 11
15 obligation. Shall I sanction you for making objections that
16 don't have foundation?

17 **MR. ATKINSON:** Your Honor, we have heard the Court.
18 I'm going to speak with my colleagues here. We'll check in
19 with Mr. Nelson. The Court has clearly given us direction.

20 If we may, we would ask to return to this issue with
21 Mr. Nelson.

22 **THE COURT:** I think that is a smart move,
23 Mr. Atkinson. We don't have time to waste, gentlemen.

24 If you want to indicate that you are preserving some kind
25 of objection, preserve it. But don't waste my time. Don't

1 waste jurors' time. It's already a difficult situation to
2 have a trial during these times. You didn't want to have a
3 virtual trial. You are demanding a jury trial, which I will
4 give you. But do not... do not abuse the process by making
5 objections that really have no basis in the code. We are
6 trying to streamline this so that the real issues can come in
7 front of the jury.

8 Are there any real issues you want to talk about in terms
9 of the evidence?

10 **MR. PARKHURST:** Your Honor, I would like to point out
11 that Your Honor did focus on Exhibit 1 for the first part
12 of -- for this discussion. However, there are numerous
13 exhibits beyond Exhibit 1 that relate to custom seizures, that
14 relate to documents, produce the executive summaries by Cisco,
15 overwhelming majority of these documents have not been
16 verified, have not been established a foundation, have not
17 established authenticity. They contain communications between
18 persons that are not parties to this case, persons that have
19 not come up in depositions.

20 It is just a huge amount of documents. I think by my
21 count --

22 **THE COURT:** So the first -- the trademark documents
23 are 1 through 5.

24 Next page.

25 **MR. PARKHURST:** Yes, Your Honor.

1 Starting at Exhibit 7 all the way through Exhibit, I
2 believe it is 73, these are all documents that are Customs and
3 Border seizures -- that relate to custom and border seizures
4 of allegedly counterfeit products.

5 These documents not only haven't been subject and put
6 forth, at least a majority of them, haven't been put forth in
7 a deposition. I think almost all of them haven't been put
8 forth in a deposition and established any foundation or
9 authenticity related to them. They contain communications
10 between none of the defendants, none of the third-party
11 defendants.

12 **THE COURT:** All right. So I'm looking at 7 through
13 39. All have the title CBP Seizure Notice.

14 What are these?

15 **MR. NELSON:** Your Honor, this is Richard Nelson for
16 the plaintiffs.

17 These are government documents. After the government
18 seized counterfeit products going to various of the
19 defendants' addresses, they then sent a notice to Cisco as a
20 trademark owner as well as the defendants alerting them to the
21 seizure. These are the formal seizure documents.

22 And we assert that they are admissible pursuant to
23 803(8)(A)(i) as a public record. Also they're kept in Cisco
24 in the ordinary course of business under 803(6).

25 **THE COURT:** Response.

1 **MR. PARKHURST:** Your Honor, Cisco's counsel,
2 Mr. Nelson, just described 803 being the hearsay exception
3 that would make them admissible. However, the foundation and
4 authenticity we take issue with, specifically -- we are not
5 admitting there is a hearsay exception that would apply,
6 however, I don't think the foundation and authenticity of
7 these documents has ever been established.

8 Not to mention, Your Honor, just also the relevance and
9 probative value of these documents because they're not -- it's
10 my understanding, Your Honor -- part of Cisco's damages
11 calculation. These products were never actually sold to my
12 knowledge.

13 **MR. NELSON:** Your Honor, if I may?

14 **THE COURT:** Who is Kenny Carter?

15 **MR. NELSON:** Kenny Carter is the Cisco witness. He
16 was deposed and he was actually asked about some of these
17 documents.

18 He is the individual at Cisco who receives these custom
19 seizures. He also communicates via email with customs. Those
20 are the exhibits coming up.

21 So he testified in his deposition with regard to the
22 process about receiving the customs notices. I think
23 specifically was shown various of these and the process then
24 of sending cease and desists to the importers, which happened
25 here. Cease and desists were sent to defendants, and people

1 working with the defendants, for some of these seizures.

2 So with regard to authenticating these exhibits,
3 F.R.E. 901, I think, shows that these are sufficiently
4 supported as government seizure notices are on CBP letterhead.
5 They're sent to the trademark owner in the ordinary course.
6 They connect to the --

7 **THE COURT:** Mr. Nelson.

8 **MR. NELSON:** Yes. I'm sorry.

9 **THE COURT:** Just hold on a second.

10 (Pause in the proceedings.)

11 I don't think I have your exhibits yet; is that right?

12 **MR. NELSON:** You don't have all of the exhibits, Your
13 Honor. We did, though, because many, many, many of these were
14 mentioned in the motions in limine and per the Court's order,
15 we had to submit those. So there were -- a lot of the
16 exhibits were actually submitted in connection with that.

17 But the actual exhibits, I think those are to be delivered
18 to the Court a week before. I'll have to check your order. I
19 think it is sometime before the trial.

20 **THE COURT:** So I have a box with respect to motion in
21 limine number 2. Is it in there?

22 **MR. NELSON:** It could be, Your Honor. If it is a
23 box, it is probably a big box.

24 (Pause in the proceedings.)

25 **THE COURT:** Okay. Great.

1 So I'm looking at 34. Do I take it that numbers -- let me
2 go back to Number 7. Okay. So 7 through 39 are all basically
3 the same?

4 **MR. NELSON:** They are the same kind of document, Your
5 Honor. Yes.

6 **THE COURT:** These are all from U.S. Border -- U.S.
7 Custom and Border Protection to Kenny Carter.

8 **MR. NELSON:** That's correct, Your Honor.

9 **THE COURT:** And he kept these in the regular course
10 of his business?

11 **MR. NELSON:** He did, Your Honor.

12 **THE COURT:** For what purpose?

13 **MR. NELSON:** Well, Cisco has recorded its trademarks
14 with Customs and has provided information to Customs about
15 screening products coming into the United States.

16 So Cisco cooperates quite extensively with Customs to stop
17 counterfeits coming into the United States. Kenny Carter is
18 the employee who is interacting with Customs with regard to
19 questions they have about particular products. He then
20 supplies the information to Customs and then they make their
21 own expert determination about whether the product is
22 counterfeit or not.

23 If they seize it, then they provide the seizure notice to
24 Mr. Carter. He tracks it. This particular one, Exhibit 7,
25 Your Honor, shows who the exporter was in China and that it

1 was going to Uddin Networks in Fremont.

2 He provides that to counsel, and then we typically send
3 cease and desist letters to the importers telling them that
4 they are violating the law, they're potentially -- Cisco
5 potential customers and asking them to stop it.

6 **THE COURT:** Let me ask you this: You gave -- you
7 said 803(6). And what else did you note?

8 **MR. NELSON:** I noted 803(8)(A)(i), which is the
9 public record exception to the hearsay rule with regard to
10 this.

11 So I think this particular document, Your Honor, you know,
12 it's kept in the -- it's received by Cisco pursuant to its
13 interactions with Customs. It's kept by Cisco pursuant to
14 803(6) I think is probably the only exception we would need
15 for this one.

16 **THE COURT:** But are you -- I have a couple of
17 questions. Under 803(6)(A), you don't actually have evidence
18 of when it was made.

19 **MR. NELSON:** Well, we do, I suppose. The actual
20 seizure notice has the government stamp on the top, the
21 June 1st, 2016. So I would think this is the date in which
22 this letter, this notice was created and sent out.

23 **THE COURT:** Yes, but Mr. Carter didn't make it. He
24 received it.

25 **MR. NELSON:** That's correct, Your Honor.

1 **THE COURT:** So it's not a Cisco business record in
2 that sense.

3 I guess my question is: For what purpose is it being
4 offered? When Mr. Carter did something -- I mean, Mr. Carter
5 receives these documents. I understand he did that in his
6 ordinary course.

7 When he receives it, he actually does something with it.
8 So is it even being offered for its truth or is it being
9 offered for purposes of explaining what Mr. Carter did every
10 time he received one of these things? If so, then it's not
11 actually hearsay because it's not being offered for that
12 purpose. But I don't know.

13 **MR. NELSON:** Certainly, Your Honor. With regard
14 to -- there will be -- Mr. Carter will testify that he
15 received certain notices. This was the very first seizure
16 notice going to Fremont and the defendants' operation.

17 We did not know -- well, when he received this, he did
18 arrange for a cease and desist letter to be sent to Uddin
19 Networks. That was sent and that is another exhibit here.

20 **THE COURT:** That's the difference, Mr. Nelson.
21 Mr. Carter doesn't know if somehow the Customs and Border
22 Patrol, for instance, got the description of the merchandise
23 wrong. He doesn't know how they put these things together.
24 Were those people deposed? Is that even relevant?

25 The question is, why does the jury have to see this other

1 than to know what Mr. Carter did in response?

2 **MR. NELSON:** Thank you, Your Honor.

3 I think -- I basically agree with Your Honor. I think
4 that in this case -- this is an unusual case because there are
5 so many seizure notices. And so part of the issue for the
6 jury is enhanced damages with regard to the Lanham Act
7 violation.

8 So if the defendant is acting recklessly, in a very
9 egregious fashion, then the jury can award enhanced damages.

10 There's two things that happen when the seizure notices
11 occur. A letter goes to the trademark owner, in this case
12 Mr. Carter for Cisco. And also a seizure notice goes to the
13 importer, in this case it was Uddin Networks. There's others
14 for ADSI, itself, and PureFutureTech.

15 Those seizure notices are received by the importer, here
16 the defendants. And when we asked the defendants about the
17 seizure notices, they asserted the Fifth with regard to Mr. --
18 two of the Sheikhs. Shahid Sheikh at his first deposition, I
19 think he claimed not to have seen these.

20 But nevertheless, this is evidence of -- that shows that
21 they would have received notice too. And we don't have their
22 particular seizure notices that came from the government. We
23 do know that when the government sends a notice like this to
24 the trademark owner, they also give notice to the importer.

25 We know that happened. There's evidence that Ms. Uddin --

1 **THE COURT:** Mr. Nelson --

2 **MR. NELSON:** Sorry.

3 **THE COURT:** Who has personal knowledge who's going to
4 testify at trial to that process?

5 **MR. NELSON:** Kenny Carter would have personal
6 knowledge about that process and then --

7 **THE COURT:** Kenny Carter can't testify as to what the
8 Border folks are doing.

9 **MR. NELSON:** Well, actually -- Your Honor, this is
10 statutory. So there are statutory regulations that control
11 this whole process. And per statute, Customs is required to
12 send this notice to the trademark owner.

13 **THE COURT:** Mr. Nelson, how many times are there
14 requirements in a statute? That doesn't mean things happen.
15 That doesn't mean things happen in the way they say they are
16 going to happen.

17 Do you know how often Federal Judges have to force
18 government officials to do what's in a statute?

19 **MR. NELSON:** I understand, Your Honor. There may be
20 other seizures that occurred that they did not follow the
21 statutory regulations. But in these situations, these 32
22 situations, they actually did comply with the statute.

23 **THE COURT:** I take it -- for purposes of our
24 discussion here, I have no reason to believe you. I mean,
25 that is, no reason not to believe you. But at trial, you

1 can't testify. And that's what -- that's why trials are what
2 they are. We have to actually bring in the people who are
3 doing it.

4 And so far I haven't heard that Mr. Carter can do that
5 because he doesn't actually know. I mean, he may assume, but
6 he doesn't have personal knowledge because he didn't do it.

7 **MR. NELSON:** Your Honor, the other side of this is
8 really important, which is, in addition to Cisco receiving
9 notice, the defendants received notice. And there is
10 testimony about that.

11 Ms. Uddin testified that she received these notices from
12 Customs, and she talked about it with the defendants. And
13 Ms. Lau, Theresa Lau received notices of the ones that were
14 being seized going to the Portland UPS office, and she
15 presented it and gave it to Kamran Sheikh.

16 So there is testimony that -- not from the defendants
17 themselves, they asserted the Fifth Amendment, but from
18 witnesses -- other witnesses who worked with the defendants
19 that these notices were received by the defendants and were
20 presented --

21 **COURT REPORTER:** I'm sorry. Excuse me, Your Honor.

22 Mr. Nelson, I did not hear the last part of your comment.

23 **MR. NELSON:** There will be testimony that these --
24 the notices that went to the defendants were actually received
25 by them, by Ms. Uddin and Ms. Lau. And as they testified at

1 their depositions, they then presented those seizure notices
2 to the defendants.

3 **THE COURT:** Okay.

4 **MR. PARKHURST:** Your Honor, if I can have an
5 opportunity to respond.

6 **THE COURT:** You may.

7 **MR. PARKHURST:** Yeah, Your Honor.

8 So I think that it's important to point out that no matter
9 who received the documents, Your Honor's point is correct that
10 there's nobody with personal knowledge, nobody from Customs
11 and Border has been deposed in this case.

12 And to the point about the documents being admitted for
13 not -- for a nonhearsay purpose, if that were the case, if the
14 Court were to rule that they were admitted for that purpose,
15 not for the truth of the matter, we would request a limiting
16 instruction be given to establish that these records don't
17 establish for the truth of the matter that any counterfeiting
18 occurred, but simply for the limited purpose that Your Honor
19 described.

20 **MR. NELSON:** Just to respond quickly to that.

21 Part of what we are having to show -- what we do have to
22 show for knowledge, we don't have to show knowledge in the
23 civil case for counterfeit. They're liable for the
24 counterfeit activity even if they didn't know it was
25 counterfeit.

1 But if we can show that they knew it was counterfeit, then
2 we do get enhanced damages. So this is important for that
3 purpose; that they were continuing to purchase products from
4 the same sources in China even though they received, you know,
5 seizure after seizure after seizure after seizure. They moved
6 their operation to Reno. They moved it to Portland. They
7 continued to do the same thing.

8 So the argument that we are going to make to the jury is,
9 that these people knew exactly what they were doing. They
10 were getting told by the government, getting told by Cisco,
11 and they continued to do it, which would then justify, in our
12 argument, the enhanced damages.

13 **THE COURT:** All right. So --

14 **MR. PARKHURST:** Your Honor, I would just --

15 **THE COURT:** Hold on. I mean, it sounds like I'm
16 going to have to hear the evidence.

17 It sounds like, tentatively speaking, these documents come
18 in for a nonhearsay purpose. And then they may come in
19 additionally for notice. That's what I'm hearing so far.
20 Without -- but it all may depend on what the witnesses say.

21 All right. All right. Issues beginning at Document 40.

22 **MR. PARKHURST:** Yes, Your Honor.

23 This is -- these documents, again, relate to the Customs
24 and Border seizure notices. However these are specific emails
25 and communications between Cisco and what appears to be

1 members of Customs and Border.

2 We would, again, raise similar objections here. These
3 communications have not been raised in deposition. They are
4 hearsay. They are communications between Cisco employees and
5 members of Custom and Border. There's no defendants on any of
6 these communications or other parties.

7 And as well, again, the relevance issue, Your Honor.
8 Again, it is our understanding that these products cannot be
9 part of the damages calculation for individual products sold.

10 **MR. NELSON:** Your Honor, Richard Nelson for the
11 plaintiffs.

12 **THE COURT:** Mr. Nelson, I am keeping my notes.

13 So I've got emails beginning at 40 through about 72 all
14 with Mr. Carter. So I'm assuming the issues are similar?

15 **MR. NELSON:** They are, Your Honor.

16 **THE COURT:** Okay. Go ahead.

17 **MR. NELSON:** Your Honor, my first comment has to do
18 with there was never any deposition testimony about this. I'm
19 surprised by that.

20 The defendants had these documents before Kenny Carter's
21 deposition. They deposed him. They asked him questions about
22 some of them. They certainly didn't ask him thorough
23 questions about all of them. But they had them. They had the
24 ability to ask the witness the question --

25 **THE COURT:** Let me say to both of you, whether or not

1 there's deposition testimony isn't dispositive of anything.
2 So --

3 **MR. NELSON:** I agree, Your Honor.

4 So the documents, from our perspective, so these emails
5 are kept in the ordinary course of business by Cisco. So
6 803(6).

7 They are -- and I take the Court's point with regard to
8 whether or not they are hearsay or whether or not they are
9 being offered not for the truth of the matter asserted.
10 Effectively that is correct.

11 This is the chain of -- this explains the chain. So,
12 initially the government, CBP in this situation, contacts
13 Cisco. They have products that they have stopped. They ask
14 Cisco to review them. They do that --

15 **THE COURT:** Mr. Nelson?

16 **MR. NELSON:** Sorry.

17 **THE COURT:** At Document 40, the document is addressed
18 to Cisco IPR.

19 What is that?

20 **MR. NELSON:** Kenny Carter testified about that. And
21 he would testify at trial that that is a -- an alias, an email
22 alias at Cisco. He is on that email alias. He monitors that
23 email.

24 **THE COURT:** Okay. So he is the one that is
25 responding to these things and/or receiving them?

1 **MR. NELSON:** Yes, Your Honor. He receives the
2 emails. Also on the email alias are engineers within Cisco.

3 And so making reference to Exhibit 40, there is then a
4 series of photographs that Customs sent to Cisco for
5 authentication, pictures of products that were being imported.

6 This is a switch. And you can see on page, I think it is
7 page 3 of this exhibit, Bates Number 2605. It's the side of
8 the switch that has the identifying information for the
9 switch.

10 Cisco is able to use this information and make an
11 authenticity determination, whether it's counterfeit or
12 genuine.

13 **THE COURT:** Now these exhibits have been -- obviously
14 have been separated. Do I take it that all of them -- that
15 there was a litany of all of these produced emails done in the
16 ordinary course?

17 **MR. NELSON:** Yes, Your Honor. All these were
18 produced, and each one of these then ties to a seizure notice.

19 These particular group of exhibits of emails then are --
20 are -- are counterfeit products that were ultimately seized.
21 And those were the seizure notices that Your Honor reviewed
22 just prior to these.

23 **THE COURT:** All right. So why doesn't this fall
24 within 803(6)?

25 **MR. NELSON:** If that is addressed to me, Your Honor,

1 it does.

2 **THE COURT:** I'm talking to Mr. Parkhurst.

3 **MR. PARKHURST:** Yes, your honor.

4 I think that the -- these wouldn't qualify as a business
5 record as email communications between Customs and Border.
6 This isn't a typical record like a 10K or some sort of
7 financial document or some sort of sales report. These are
8 live communications between Cisco -- persons at Cisco and
9 persons at Customs and Border Patrol. It's not --

10 **THE COURT:** Is he going to testify that this was his
11 job?

12 **MR. NELSON:** He is, Your Honor.

13 **THE COURT:** If it's his job and this is the manner in
14 which he does his job and it was done at the time or near the
15 date of the event, kept in the ordinary course, was a regular
16 practice, how does that not fit within 803(6)?

17 **MR. PARKHURST:** I think, Your Honor, I would go back
18 to it's -- it's a communication between the two --

19 **THE COURT:** I understand what it is. That wasn't my
20 question.

21 **MR. PARKHURST:** Given Your Honor's description, I --
22 right now it's not -- not seeing part of the statute that
23 803(6) if it's kept --

24 **THE COURT:** Tentatively these things come in
25 assuming, Mr. Nelson, you can, in fact, lay the foundation

1 that it's a business record. Not all emails are business
2 records. And I've got -- I've had many litigators who have
3 not been able to get emails in at trial. Part of it is
4 because they don't think about the evidence code.

5 So, you have to set the foundation that it comes within
6 the confines of 803(6), but it sounds to me, from your
7 proffer, like it would. But you still have to set the
8 foundation.

9 **MR. PARKHURST:** Your Honor, I also just would like to
10 point out, and apologies for not mentioning earlier, 803(6)
11 would apply for the actual fact it is a business record, but
12 the content of the email would still be hearsay.

13 **THE COURT:** These are this -- is information upon
14 which people rely to do their job. Unlike the California Code
15 of Evidence, the Federal Code of Evidence provides more
16 leeway. And the question is, whether or not these are
17 trustworthy documents. The manner in which we figure out
18 whether something is trustworthy is by looking at the purpose
19 for which they are being used.

20 It sounds to me that this was his job. And so -- and if
21 it's his job -- you will have a chance to cross-examine him
22 and then I can make the determination then.

23 I'm giving you, given these kinds of objections on this
24 list, my preliminary sense of what the issue is.

25 **MR. PARKHURST:** Understood, Your Honor.

1 And that's -- it's just our -- the position is that the
2 statements themselves would be statements made by Cisco. It's
3 not a party admission. It's not -- it's by Cisco and by
4 Customs and Border Protections. This would be statements made
5 among themselves even though --

6 **THE COURT:** Mr. Parkhurst, it says absolutely nothing
7 to do with an admission. The question is, is whether it is a
8 business record under 803(6). They are two entirely separate
9 portions of the Code of Evidence.

10 **MR. PARKHURST:** Understood, Your Honor.

11 That's the -- the objection is based on the content of the
12 email. The record -- the email may be a business record under
13 803(6), but it's the content, the statements within --

14 **THE COURT:** There is no difference. You are trying
15 to make a distinction where one doesn't exist.

16 **MR. PARKHURST:** Understood, Your Honor.

17 **THE COURT:** I mean, that's like saying, okay, we have
18 a general ledger. The general ledger is a business record but
19 none of the numbers therein are business records.

20 That's the analogy you are trying to make.

21 **MR. PARKHURST:** Yes, Your Honor. That would go back
22 to your trustworthiness point. A ledger just records numbers.
23 It records the data, the output of a sale. These are
24 communications. These are actual statements, written
25 communications --

1 **THE COURT:** Well, you will have an opportunity to
2 object.

3 **MR. PARKHURST:** Thank you, Your Honor.

4 **THE COURT:** All right.
5 73.

6 **MR. NELSON:** 73, Your Honor, is a portion --

7 **THE COURT:** Hold on.

8 **MR. NELSON:** It's a deposition, Your Honor.

9 **THE COURT:** 73 is not in my binder.

10 **MR. NELSON:** Yes, Your Honor. It's a videotape, Your
11 Honor.

12 It's a videotape of a portion of a deposition of Shahid
13 Sheikh. Depending upon the Court's ruling with regard to the
14 Fifth Amendment issues, if Shahid Sheikh testifies, then we
15 will use this, if it's appropriate, to cross-examine him.

16 **THE COURT:** Okay.

17 **MR. NELSON:** If he doesn't testify, then we may have
18 to address it separately.

19 **THE COURT:** 74?

20 **MR. NELSON:** 74 is under the C & D letters I
21 described, Your Honor. So this is a C & D letter actually
22 sent by my firm to Uddin Networks at Kenny Carter's direction.

23 **THE COURT:** Well, if necessary, I will allow
24 Mr. Colosi to testify for five minutes that he sent it.

25 **MR. NELSON:** Mr. Colosi is on the witness list by the

1 defendants, Your Honor, and he would be able to testify to
2 that effect.

3 Ms. Uddin received the letter. I believe in her
4 deposition, Your Honor, she didn't recall the actual document.
5 Mr. Colosi would be able to testify about this.

6 **THE COURT:** 75. I mean there are a series of these
7 same things or what is --

8 **MR. NELSON:** They are, Your Honor. So 75 is the same
9 thing. It's a C & D that went to McIntosh Networks. Jessica
10 Little asserted the Fifth Amendment with regard to whether she
11 received this document. It was sent to her address in
12 Berkeley in her madame name -- mother's madame name, I
13 guess --

14 **THE COURT:** 76.

15 **MR. NELSON:** 76. So Ms. Little responded to a
16 discovery request -- oh, I apologize, Your honor.

17 76 is a letter that Ms. Little sent. And she sent it to
18 my firm in response to the C & D denying that she had any
19 knowledge of McIntosh Networks, a company that she had
20 established the UPS box three months earlier. But in the
21 letter she says she had no idea what McIntosh Networks is. It
22 was received by my firm. I asked her about it at the
23 deposition; she asserted the Fifth Amendment.

24 **THE COURT:** All right.

25 And, Mr. Crosby, you're objecting to this letter, or not?

1 You are on mute, Mr. Crosby.

2 **MR. CROSBY:** Yes, Your Honor. Only in the sense that
3 my client has asserted her Fifth Amendment right. Should
4 plaintiff attempt to introduce this to the jury at trial, that
5 can be addressed at that time.

6 **THE COURT:** Well, it certainly could be a party
7 admission. How does that play out, Mr. Crosby, if it's a
8 party admission?

9 **MR. CROSBY:** If it's a party admission and Your Honor
10 finds that way, then it would be an admissible document.

11 **THE COURT:** All right.

12 77? Same issues all with Ms. Little.

13 **MR. NELSON:** This is a little bit different, Your
14 Honor. This (sic) is the documents that she produced in this
15 case. And there are many documents coming up, which are
16 produced by the defendants, and they are not agreeing to the
17 admissibility or the foundation for those documents that they
18 produced in discovery.

19 This would be a party admission, Your Honor. I don't know
20 if we have to go that far. These were documents produced by
21 Ms. Little in the -- in this litigation.

22 **THE COURT:** When the production was made, did someone
23 certify it?

24 **MR. NELSON:** I would have to double-check that,
25 whether there's a certification. I confronted Ms. Little with

1 these documents at her deposition, and she asserted the Fifth
2 Amendment.

3 **THE COURT:** That's through what, Mr. Nelson?

4 **MR. NELSON:** That is for 77.

5 For 78, Your Honor, those are records which we subpoenaed
6 from a third party. And so this is the production from -- in
7 this case, it's UPS in Reno. And we have the Custodian of
8 Record's declaration pursuant to the subpoena.

9 That's the case for the ones coming up through 84.

10 **THE COURT:** All right. So those look like business
11 records under 803(6)?

12 **MR. NELSON:** Yes, Your Honor.

13 **THE COURT:** And they are certified with the subpoena?

14 **MR. NELSON:** Yes, Your Honor.

15 **THE COURT:** And you have the certification?

16 All right. Any comments on that? Objections seem
17 unfounded.

18 (No response.)

19 How about at 87 then?

20 **MR. NELSON:** 87, Your Honor, or 85?

21 **THE COURT:** 85.

22 **MR. NELSON:** 85, this is 803(6). It's a business
23 record. So this is a letter that Cisco sent to ADSI with
24 regard to ADSI's partnership status. ADSI was an authorized
25 Cisco partner until 2015.

1 **THE COURT:** I don't have 85. My binder jumps from 83
2 to 88.

3 **MR. NELSON:** The reason for that, Your Honor, is this
4 is not cited in our motion in limine. So I apologize for
5 that.

6 Our plan is to get you the entire 1 through the end per
7 the Court's order, I think it's a week before trial. But the
8 other ones were cited in the motions in limine.

9 **THE COURT:** I see. Okay.

10 So, again, who drafted the letter?

11 **MR. NELSON:** Let me just grab the letter, Your Honor.

12 (Pause in the proceedings.)

13 So the letter was actually sent by -- just going down, I'm
14 sorry -- Jennifer Louie, who is one of Kenny Carter's
15 colleagues. He, Kenny Carter, was involved in this letter
16 because it was part of his group. And so he has personal
17 knowledge of this letter.

18 And it's kept in the ordinary course of Cisco's business.
19 Okay.

20 **MR. PARKHURST:** Your Honor, we would --

21 **THE COURT:** I know, you are objecting to everything.

22 With respect to all of these, Mr. Nelson, you're going to
23 have to set the foundation that these things are business
24 records. If they are business records as we have gone
25 through, they will be admitted.

1 **MR. NELSON:** Thank you, Your Honor. I understand.

2 **THE COURT:** So 85 through 87 are all letters?

3 **MR. NELSON:** That's correct, Your Honor. And they
4 are all -- so they would fall under the business record
5 exception that we will make out in trial.

6 Beginning on 88, Your Honor, all the way through 103,
7 these are all defendants' records and produced by the
8 defendants, Bates numbered by the defendants.

9 Some of them I confronted the defendants with, and either
10 they asserted the Fifth Amendment or testified. It would
11 depend. But they are all defendants' documents. I can't for
12 the life of me imagine why they are not agreeing to the
13 foundation of their own documents.

14 **MR. PARKHURST:** Your Honor, just -- Andrew Parkhurst
15 for the defendants.

16 I think it goes back to our position we raised earlier
17 about not wanting to create a record of stipulating to
18 evidence. However, given the Court's earlier statements about
19 other records, we certainly, with respect to these through --
20 it looks like it's through Exhibit 103, I'd like to take
21 another opportunity to discuss with Mr. Nelson about these.

22 **THE COURT:** Okay.

23 Well, it looks like they go beyond 103. The next set are
24 business records of PureFutureTech.

25 **MR. NELSON:** 103, Your Honor, you will see from the

1 Bates Number CCO -- so this was produced, I believe that was
2 the Bates number methodology used by the third-party
3 defendants.

4 And this is just the corporate documents that were filed
5 by ADSI with the California state authorities. So part of
6 these documents, Your Honor, I confronted the witnesses during
7 their depositions. Shahid Sheikh, in the first part of his
8 deposition, testified about the documents. Roya, his wife,
9 the mother to Imran and Kamran testified to these documents as
10 well.

11 So, I don't believe that the defendants are going to
12 dispute these publicly-filed documents, and we can probably
13 resolve that with Mr. Parkhurst.

14 **THE COURT:** Okay. That takes us through 107.

15 108?

16 **MR. NELSON:** So this is a -- these are the government
17 contracts which involves Cisco products sold by the
18 defendants.

19 Actually, then I showed this list, I believe, to Shahid
20 Sheikh. He didn't acknowledge the various sales to the
21 government. Chuck Williams -- Charles Williams is cited as a
22 sponsoring witness. He's familiar -- works with the GSA a
23 lot. He's familiar with GSA contracting. And this document
24 shows the various products that the defendants have sold to
25 the government over the years.

1 If this were a normal case, Your Honor, of course in trial
2 I would show this to the owners of ADSI and have them confirm
3 that they made all these sales to the government.

4 Unfortunately, I don't have that opportunity.

5 So they are thwarting the submission of evidence to the
6 jury. The -- we will get to it, I think, in the motions in
7 limine, but there is evidence that they have sold to the
8 federal government. We have several government entities that
9 have testified in depositions, et cetera. There are numerous
10 invoices from ADSI to government entities.

11 And Shahid Sheikh, in the first part of his deposition,
12 before he started asserting the Fifth Amendment, confirmed
13 these sales. He wasn't personally involved in them.
14 Individuals in Pakistan were conducting those sales, but he
15 was aware of the sales and he confirmed the document.

16 In a normal trial, I would be able to show these
17 particular transactions to the defendant and have them confirm
18 that. I think we are at an unusual impasse, Your Honor.

19 **THE COURT:** Response?

20 **MR. PARKHURST:** Your Honor, as Mr. Nelson said, these
21 records have not been authenticated. There's no foundation
22 laid for these. They are documents printed off a government
23 website. It appears -- those are our objections.

24 **THE COURT:** I'm not sure what the foundation is going
25 to be, Mr. Nelson.

1 **MR. NELSON:** I understand, Your Honor. Actually, as
2 I marked it on the exhibit list, Your Honor, we are not going
3 to be seeking to admit these into evidence. They are being
4 marked for identification only.

5 **THE COURT:** Okay.

6 The next, 110?

7 **MR. NELSON:** 110 -- so ADSI is a government supplier.
8 They are on the GSA portal. And the Exhibit 110 is their
9 registration with the GSA.

10 I believe -- I don't have it in front of me. I believe I
11 showed this to Shahid Sheikh when he was answering questions,
12 and he did confirm multiple times that ADSI did sell products
13 through the GSA portal.

14 At this point, Your Honor, I'm not sure that I need this
15 document to be admitted to the jury. It will depend upon Your
16 Honor's ruling on the adverse inference motion in limine.

17 The fact of the matter is, ADSI sold their counterfeit
18 Cisco products to the federal government. That is an
19 important aspect of the case. It does -- we are using it to
20 have the jury consider that, about the appropriateness of
21 enhancing the damages.

22 The -- so I think the fact that they sold to the federal
23 government and they were on the GSA -- I don't think the
24 defendants are disputing.

25 **THE COURT:** Okay. Hold on just a minute.

(Pause in the proceedings.)

THE COURT: Okay. Part of my reason for going through with some measure of detail was for me to get a sense of how I think about evidence. So the question is, are there other things in here for which you might need some guidance?

MR. NELSON: Rick Nelson for the plaintiffs, Your Honor.

No, Your Honor, I understand the Court's directions.

MR. PARKHURST: Andrew Parkhurst for the defendants.

Your Honor, I also understand the Court's position from earlier.

MS. FRIEND: Your Honor, Kate Friend for other third-party defendants.

I did want to raise -- there are some issues that we raised in the meet and confer with the defendants about some documents on their portion of the exhibit list that relate to various of the third-party defendants who have now been granted summary judgment and that we believe should actually be removed from their exhibit list. They are no longer of any relevance to the case.

THE COURT: Exhibit numbers?

MS. FRIEND: Sure. Those documents would include Number 318, Your Honor.

THE COURT: All right. So let's -- I thought I had in my standing order a notation that these exhibit lists were

1 supposed to be annotated to show where you're doing things for
2 identification only or where it was not a primary document to
3 help manage irrelevant objections. And maybe that wasn't
4 clear, but let me be clear on some of these things.

5 Deposition transcripts do not come into evidence. And it
6 looks like who's ever put excerpts in here indicated that it
7 was for identification only, so I don't know why there are
8 objections.

9 Expert reports do not come into evidence. Same issue.

10 So let's go to, you said, 30 --

11 **MS. FRIEND:** There are approximately 10 of them, Your
12 Honor. The first one would be 311.

13 **THE COURT:** So this is an exhibit?

14 **MS. FRIEND:** These are exhibits, Your Honor. Some of
15 these are documents that were exhibits used in conjunction
16 with the summary judgment motion. They include things like
17 Rahi Systems' responses to request for production.

18 **THE COURT:** All right. Let's talk about those. Are
19 those actually -- well, those don't come into evidence either.

20 **MS. FRIEND:** Correct.

21 **THE COURT:** That doesn't mean that information from
22 certified documents such as that can't come in, but the
23 document doesn't come in.

24 So what is it that you -- what do you all want from 311?
25 What is the point?

1 **MR. PARKHURST:** Your Honor, we put that on -- sorry.
2 This is Andrew Parkhurst for defendants.

3 We put this on the exhibit list to show Rahi's lack of
4 response, that Rahi refused to turn over the records of their
5 Cisco sales as part of discovery, which we believe was part of
6 our case for bringing the indemnity claim against Rahi, but
7 now the Court has ruled on the summary judgment motion.

8 To Ms. Friend's -- in a meet and confer, she did raise the
9 possibility, at that time there was no ruling on the motion
10 for summary judgment, we couldn't agree to anything then. She
11 has emailed last night, around 4:00 p.m., about the
12 possibility of removing those.

13 We haven't had a chance to make a determination about
14 whether or not those exhibits would be something that could
15 still have relevance and something we would need to use with
16 the remaining third-party defendant, Ms. Uddin, but that's
17 where that stands on these documents.

18 **THE COURT:** All right. Meet and confer on that.
19 311, 312, what else?

20 **MS. FRIEND:** I assume we will meet and confer
21 further, Your Honor, with Mr. Parkhurst. I don't want to take
22 up -- I don't want to belabor this if we are able to meet and
23 confer about it.

24 **THE COURT:** Okay. What else do you want to talk
25 about in terms of exhibits?

1 **MR. NELSON:** From the plaintiffs, Your Honor, there
2 is nothing additional.

3 **MR. PARKHURST:** Nothing, I think, from defendants,
4 Your Honor.

5 **THE COURT:** All right. I'm going to need an updated
6 exhibit list.

7 How much time do you want to meet and confer?

8 **MR. PARKHURST:** Your Honor, I guess it all depends --
9 I guess we don't know --

10 **THE COURT:** Mr. Parkhurst, you need to be ready to go
11 to trial. This case is going to get all wrapped up with a bow
12 on top, and as soon as I can take you out, you are going to go
13 out.

14 **MR. PARKHURST:** Understood, Your Honor. I defer --
15 if there's a good time for plaintiff to meet. Maybe a week?

16 **MR. NELSON:** Your Honor, we are available to meet
17 over the weekend.

18 **MR. KIRKE:** As is third-party defendant Nabia Uddin.

19 **THE COURT:** I just need it at some point. You can
20 get it to me by next Friday.

21 Okay. So these -- all of these excerpts, and I don't
22 recall seeing any objections lodged. Is there nothing to do
23 on that front?

24 **MR. NELSON:** I apologize, Your Honor. I missed the
25 first part of Your Honor's question. The excerpts, are we on

1 to the next one?

2 **THE COURT:** This is my (indicating) -- my gift from
3 you all.

4 **MR. NELSON:** Sorry, I apologize for the gift as well.

5 We are on to the list of proposed discovery excerpts,
6 audios, and videos. There's nothing that the plaintiffs need
7 to address with the Court.

8 **THE COURT:** Anybody else?

9 **MR. PARKHURST:** Your Honor, Andrew Parkhurst for
10 defendants.

11 We included in ECF-247 the objections that we have for
12 certain portions of the deposition transcript --

13 **THE COURT:** Did you put it in a binder?

14 **MR. PARKHURST:** This was submitted by third-party
15 defendants' binder, Your Honor. I assume they have it in
16 their --

17 **THE COURT:** I don't remember seeing it. Hold on.

18 **MR. PARKHURST:** We submitted a joint binder.

19 **THE COURT:** I have lots of binders from all of you.
20 I don't remember seeing one on that issue.

21 (Pause in the proceedings.)

22 **MS. FRIEND:** Your Honor, I believe it is Docket 247
23 is the order.

24 **MR. NELSON:** Kate, this is the one that you delivered
25 to the Court?

1 **MS. FRIEND:** Yes.

2 **MR. NELSON:** Was it in a binder when it was
3 delivered?

4 **MS. FRIEND:** I believe so.

5 **MR. KIRKE:** Yes -- yes, it was. And I believe we
6 received confirmation that it was -- that it was delivered.

7 **THE COURT:** So walk me through how you set this up.
8 I now have -- I'm looking at 247. So where are these -- is
9 that where Exhibit Tab A is? Tab 1 here?

10 **MR. NELSON:** Document 247, Your Honor, is the
11 document -- the list of proposed discovery excerpts. That was
12 done after the other ones were done. So we, the plaintiffs,
13 provided the Court with a binder with eight of the components.
14 This fifth component was delivered by third-party defendants.
15 I'm not quite sure of their numbering within the binder.

16 247 shows the designations of particular portions of
17 depositions that were being offered by the parties, and then
18 if there was any dispute about that, that was indicated in
19 that column.

20 I could give the Court an overview, at least of the ones
21 the plaintiff put in.

22 **THE COURT:** So I'm trying -- this huge document that
23 I have, called a Proposed Discovery Excerpts Audios and Videos
24 that were sent -- Mr. Kirke, that I have from you, it's a --
25 it has an index that's a two-page chart, and then it has 28

1 exhibits, but there is no -- there is no ECF number.

2 So what is that, Mr. Kirke?

3 **MR. KIRKE:** Your Honor, those contain the excerpts
4 of, including deposition designations and objections that my
5 office gathered and then put together and submitted.

6 **THE COURT:** Does that correlate to this document,
7 Docket 247?

8 **MR. KIRKE:** It does, Your Honor.

9 And in all candor, the -- I believe the Court's order is
10 that there should be, I think, no more than six pages of
11 excerpts for the Court to review and rule on objections.
12 There are well more than six pages.

13 So I don't know if we should include this as part of the
14 meet-and-confer process, and my office can confirm what we
15 thought was sent over, what we received confirmation of a
16 binder being delivered to the Court.

17 **THE COURT:** Let's just look at Number 1 as an
18 example.

19 So this is the deposition of Mr. Love?

20 **MR. NELSON:** Yes, Your Honor. So Mr. Love is the IT
21 person in charge of the U.S. Army National -- I'm sorry. He's
22 with the U.S. Army, Your Honor. And we deposed -- Shahid
23 deposed him with regard to their purchase of counterfeit
24 products from ADSI.

25 So this -- these excerpts that we have from his deposition

1 were his authorization of the various documents that show that
2 the products ADSI sold to the Army were counterfeit.

3 **THE COURT:** So the first objection is at page 31,
4 lines 16 and 17?

5 Why is this on this list? That is, that 16 and 17 is the
6 objection.

7 **MR. PARKHURST:** Yes, Your Honor. Andrew Parkhurst
8 for the defendants.

9 The deposition transcript that they have submitted for
10 Mr. Love, we're identifying where we interposed objections to
11 that testimony.

12 **THE COURT:** You want me to strike the objection or
13 are you seeking to have more of this stricken than you've
14 identified?

15 **MR. PARKHURST:** Well, Your Honor, the portion in
16 dispute, we're identifying where we disputed to testimony
17 given by Mr. Love.

18 And this may be an oversight. We may have done this
19 wrong. This may be something that needs to be part of the
20 meet and confer.

21 **MR. NELSON:** This is Richard Nelson for the
22 plaintiffs.

23 A meet and confer might be helpful, Your Honor. These --
24 the depositions took place of third parties. This deponent is
25 back in Maryland; obviously can't be present for trial. He

1 was deposed so that he could give testimony about the
2 documents that the government had.

3 I don't really suspect that Mr. Parkhurst or Mr. Atkinson
4 are going to challenge that testimony. They asserted
5 particular objections during the testimony, but the -- I mean,
6 I imagine that upon reflection, they may accept the fact that
7 this testimony is out there. They can argue with regard to
8 the force of the testimony, but this is -- this is litigation
9 101, Your Honor.

10 We had an out-of-state witness, we deposed them. We asked
11 questions particularly to authenticate documents. And those
12 documents, we presume, would be admitted and not without
13 objection. They could argue that somehow these counterfeit
14 products are not -- they can argue whatever they decide to
15 argue, but I don't think that they are really going to argue
16 that the questions and answers at the deposition were
17 improper.

18 **THE COURT:** Okay. This is -- a couple of things.

19 One is, just because someone makes an objection at the
20 deposition or a deposition, doesn't mean that it's a good
21 objection. In terms of presentation of evidence through
22 deposition testimony, whether you're reading it or doing it by
23 video, all objections should be stricken from the recitation
24 unless -- you know, I've done this on the fly, in which case
25 someone makes the objection and I rule on the bench, and the

1 answer is read or not read, but that is not this case.

2 So, Mr. Parkhurst, you need to go back and decide whether
3 you want to stand on that objection. But what you're asking
4 me to strike is the testimony that follows, not your
5 objection.

6 The way I do this, so that you know, is I want a proposed
7 order that tracks what it is you want me to do. I'm going to
8 sit down -- I want a binder in one hand with all of these
9 documents and I want my proposed order in the other. And I
10 want to be able to -- there should be a column or a line or
11 something where I check a box. Is it -- you know, is the
12 objection sustained or overruled.

13 And then -- and I'm not going to type it up. I am going
14 to use a pen. I'm going to strike it and I'm going to file
15 it, and you all are going to comply.

16 That means that every single line item has to have its own
17 space. The reason -- and litigators, you know, you're not
18 always judicious with what it is you present.

19 The reason I limit you to six pages is because you
20 apparently will take as many pages as I give you. So if I
21 said 10, I would have 10 pages of objections. I give you six.
22 You get to divide them equally if there is a dispute. And
23 that's all I'm going to do. You are just going to have to
24 deal.

25 So you figure out what is the most important because I

1 have a limited amount of time, and that's what you get.

2 Sometimes -- you know, sometimes it's hard for me to make
3 a ruling if I don't have enough context. So frequently I'll
4 get page 5, and then page 52, and then page 101. And you want
5 me to strike something on each of those pages, but you don't
6 give me the pages before or after that explain so I can read
7 and figure out what the context of the examination was.

8 And so sometimes you will get back a lot of blanks because
9 I don't know because you haven't given it to me. And it is
10 incumbent on you to give it to me. Okay?

11 I also need to know who these people are. So, if you've
12 identified them on your witness list, then I can go back and I
13 can cross-reference so I can understand who they are.
14 Sometimes you don't give that to me. You have to give it to
15 me if you want a ruling. Okay?

16 So why don't you all work on that. And it looks like I'm
17 going to need it back again.

18 Do you need any more guidance on that topic?

19 **MR. PARKHURST:** Not from defendants, Your Honor.

20 **MR. NELSON:** Not from plaintiffs.

21 There are a number of deposition excerpts that we have
22 beginning at Number 7, 8, 9, 10 -- 7, 8, 9 in particular,
23 which have to do with the motions in limine. So these are the
24 assertions of the Fifth Amendment.

25 So presumably, depending on the Court's ruling, there --

1 it would just be -- they would just be eliminated. I don't
2 think there's anything to discuss at this point, but that is
3 the reason why some of these are listed.

4 **THE COURT:** Okay.

5 We are going to pass on jury instructions, I think, for
6 now unless there is something that -- let me ask this: The
7 Fifth Amendment one I understand.

8 Supplemental instruction -- the special instruction P1-1,
9 page 56 of 81, to where the disputes begin, is this an
10 objection?

11 Because you don't think that the evidence will be there or
12 is it -- is there something else going on? I mean, what I
13 don't have are counterpositions with respect to each of these.

14 Special instruction P1 is proffered, I take it, from the
15 plaintiffs, and the defendants object, but I don't see any
16 argument.

17 **MR. NELSON:** Your Honor, from the plaintiffs'
18 standpoint, so this was suggested by us.

19 **THE COURT:** I assumed because it says you agree and
20 you gave me your authorities.

21 **MR. NELSON:** Yep.

22 **THE COURT:** What I don't have is the basis for the
23 objection.

24 **MR. ATKINSON:** Your Honor, this is Tyler Atkinson for
25 the defendants.

1 The basis for the objection is simply that we did not
2 believe that these particular instructions needed to be
3 provided. They seem to be surplusage with the instructions,
4 the model instruction. That said, if the Court believes this
5 will aid the jury, then that's the Court's prerogative
6 obviously.

7 **THE COURT:** But, Mr. Atkinson, sometimes jury
8 instructions are proffered that people actually believe are
9 wrong on the law and/or where there is specific objections to
10 language, and that's fine. That's what I didn't know.

11 So, if your argument -- if there's nothing wrong in here
12 as a matter of law and your argument is that it's just not
13 necessary, that's fine. I just didn't know one way or the
14 other.

15 **MR. ATKINSON:** I believe the statements of law are
16 correct. So, yes, Your Honor, I appreciate that. Our
17 objection is limited to we don't believe it is necessary.

18 **THE COURT:** Okay.

19 What about -- there was one before that. Page 53 of 81,
20 the adverse inference. That's the Fifth Amendment, but --
21 let's not do that one right now.

22 All right. The one after that then is 5.5. This is a
23 model instruction. You just think it's not necessary?

24 **MR. ATKINSON:** Sorry, Your Honor, 5.5?

25 **THE COURT:** Right. You disagree.

1 **MR. ATKINSON:** I just have -- I am looking at the
2 ECF-248, Document 248?

3 **THE COURT:** No. Docket 240 are the jury
4 instructions.

5 **MR. ATKINSON:** There were omitted instructions.

6 **THE COURT:** Okay.

7 (Simultaneous colloquy.)

8 **MR. ATKINSON:** Sorry, Your Honor.

9 **THE COURT:** I went through the binder. So --

10 **MR. ATKINSON:** Your Honor, I will pull up the former
11 instructions just so I have apples to apples.

12 (Pause in the proceedings.)

13 **THE COURT:** So I'm pulling up your now -- the new
14 one.

15 All right. So 5.5 you still -- still you disagree?

16 **MR. ATKINSON:** I'm sorry, Your Honor, I'm not seeing
17 it in the table. Can you give me a page reference?

18 **THE COURT:** On which document?

19 **MR. ATKINSON:** On Document 248, if you pulled that
20 up.

21 **THE COURT:** Well, I'm looking at the chart on 248.
22 On 240, which has 5.5, it's page 58 of 81.

23 **MR. ATKINSON:** This may have been an instruction that
24 was withdrawn by one of the parties.

25 **THE COURT:** That's why I picked up 248. It is

1 showing on 248.

2 **MR. NELSON:** I'm wondering, we don't have a 5.5. We
3 have a 15.5 and there's some dispute on 15.5.

4 **THE COURT:** I'm sorry. You're right, 15.5. I'm
5 sorry.

6 (Pause in the proceedings.)

7 **MR. NELSON:** The plaintiffs have no objection to
8 15.5, Your Honor. I believe the objection was by the
9 defendants.

10 **THE COURT:** I understand that, Mr. Nelson. I am
11 waiting for the defense.

12 **MR. NELSON:** Okay.

13 (Pause in the proceedings.)

14 **MR. ATKINSON:** I believe our objection to this may
15 have been based on language that was omitted. This may have
16 been a -- there was a choice not to include some bracketed
17 language.

18 But I believe it's possible that during meet and confer
19 with the plaintiffs, we were satisfied that plaintiff said
20 they were not seeking future liability, and so that
21 clarification mooted the dispute. I apologize, Your Honor, we
22 should have made sure that's clear to the Court.

23 Mr. Nelson, correct me if I'm wrong, I think that was the
24 issue and I think we were satisfied that the bracketed
25 language didn't need to be included with the clarification

1 that the plaintiffs were not looking for forward liability.

2 **MR. NELSON:** I believe, Your Honor, that there is
3 bracketed language after 1 and 2, which is on the pattern
4 model jury instruction that has to do with -- it has to do
5 perhaps with steps that the defendants may have to take in the
6 future to correct the counterfeit issues, and we are not
7 seeking that.

8 **THE COURT:** So in Docket 248, there's no objection at
9 this point?

10 **MR. ATKINSON:** There is none, Your Honor. Yes, Your
11 Honor, there is none.

12 **THE COURT:** 15.6. What is the objection there from
13 the defense?

14 (Pause in the proceedings.)

15 **MR. ATKINSON:** I'm sorry, Your Honor. I don't see
16 why we objected to this. This is a model instruction. It
17 looks like it would be appropriate to give this.

18 **THE COURT:** All right. So noted. The objection at
19 15.6 is withdrawn.

20 The next one I see, Special Instruction P-2.

21 **MR. NELSON:** Do you want to hear their objection?

22 **MR. ATKINSON:** On this one, I don't believe we had an
23 issue with the statement of law, the necessity of giving this
24 instruction.

25 **THE COURT:** Objection to Special Instruction P-3?

1 **MR. ATKINSON:** The objection had to do with the
2 necessity of giving this instruction.

3 **THE COURT:** P -- let's see. The next one I see then
4 is plaintiffs' objection to 15.29 or is it just we have
5 competing --

6 **MR. ATKINSON:** We have competing, Your Honor. We
7 offered the model instruction and as I understand it,
8 plaintiffs added language to account for 2020 Supreme Court
9 case, and I can speak to that if the Court would like to hear
10 me.

11 **THE COURT:** All right. Go ahead.

12 **MR. ATKINSON:** Your Honor, I think -- and counsel can
13 speak for himself, but I think counsel's position, as we have
14 met and conferred on this, is that the Supreme Court in the
15 *Romag* case articulated that a showing of willfulness is not
16 required to obtain a trademark infringer's profits.

17 We don't -- we think the model is properly drafted by the
18 Ninth Circuit. We don't believe that additional sentence is
19 necessary. In fact, the case, which the court has the
20 citation, it's -- I'll spare the court reporter reciting it
21 because I know it's in front of the Court. In the *Romag* case,
22 the Court said at page 1497, and I'm just going to quote this
23 language. I am sure the court will review the case itself.

24 Quote: "Given these traditional principles, we do not
25 doubt that a trademark defendant's mental state is a highly

1 important consideration in determining whether an award of
2 profits is appropriate" period. "But acknowledging that much
3 is a far cry from insisting on the inflexible precondition to
4 recovery Fossil advantage," unquote.

5 So while the Supreme Court very clearly thinks you do not
6 need a showing of willingness -- excuse me, willfulness to
7 obtain the infringer's profits, it does not go so far as to
8 denounce that consideration by a fact finder.

9 And for that reason, we think it calls attention to
10 something that really a jury shouldn't be necessarily thinking
11 about on the question of profits. The Court says you don't
12 need to get into willfulness on the question of profits.

13 So we think the Ninth Circuit instruction is not wrong.
14 It's not really missing anything. It actually adds -- it
15 attracts attention to an issue if we start saying a showing of
16 willfulness is not required. The instruction, as drafted,
17 doesn't suggest willfulness is required.

18 **THE COURT:** Okay.

19 **MR. NELSON:** Really briefly, Your Honor.

20 The model instruction, obviously, was drafted and put
21 together before the Supreme Court ruled on the *Romag* case just
22 a few months ago. So that particular issue of willfulness was
23 hotly disputed. That is what -- that is why the Court took up
24 the case because there was a conflict.

25 The Supreme Court now has ruled on that. We just added

1 that sentence in the first paragraph. This is a -- this is
2 the added sentence is -- is -- reflects a holding from the
3 Supreme Court that settled this issue. We think it would be
4 appropriate to instruct the jury with regard to the current
5 state of the law.

6 **THE COURT:** Okay. I understand the issue.

7 The next objection I see is to -- well, this is the
8 equitable indemnity. There's -- defendants object.

9 **MR. ATKINSON:** Yes, Your Honor.

10 I -- part of this comes down to, we wanted to address with
11 the Court how this case is going to be tried in terms of the
12 sequence and in terms of the defendants' complaint against the
13 third-party defendant Nabia Uddin.

14 We think, to the extent equitable indemnity needs to be
15 discussed with the Court, briefed to the Court, that would
16 properly be done outside of the jury instruction process.

17 **MS. FRIEND:** Your Honor, I'm not sure that I
18 understand counsel's objection in this case.

19 **THE COURT:** Is equitable indemnity a jury question?

20 **MS. FRIEND:** Your Honor, there is a jury instruction
21 for equitable indemnity within the CACI instructions so that's
22 why we included this.

23 The underlying issue is that the only remaining cause of
24 action in this case that involves our client --

25 **THE COURT:** Hold on.

1 **MS. FRIEND:** I'm sorry.

2 **THE COURT:** I don't see a cite to the CACI
3 instruction.

4 **MS. FRIEND:** It is -- it might be somewhat buried in
5 there. It's 3800, Your Honor. And it's at line 6, page 75.

6 **THE COURT:** I see it. Thanks.

7 All right. Go ahead.

8 **MS. FRIEND:** So the only remaining claim against our
9 client really arises out of the UCL, Your Honor. And since
10 the Court ruled at the beginning of this case that the Lanham
11 Act claims were dismissed, and that's really the basis for the
12 unlawfulness component of the UCL claim brought by the
13 plaintiffs, what's left is really the fraudulent or unfair
14 components.

15 And there's a recent case that came out of the California
16 Supreme Court earlier this summer where the Court clarified
17 that the UCL claim is an equitable claim that is an issue of
18 law that should be decided by the Court. However, the
19 indemnity claim remains a jury question, of course.

20 **THE COURT:** Okay. So what is the objection to the
21 instruction itself?

22 Mr. Atkinson, you're muted.

23 **MR. ATKINSON:** Sorry. I had a good streak there of
24 not doing that by accident.

25 To the extent the instruction tracks with CACI 3800, and

1 it would need to be updated to reflect Ms. Uddin, we don't
2 necessarily have an issue with that other than the larger
3 question for the Court of how the Court wants to proceed on
4 our third-party complaint.

5 **THE COURT:** Okay. Let's keep going. There is an
6 objection to special instruction -- or to TPD Number 3.

7 What's the objection here?

8 **MR. ATKINSON:** I believe, if it tracks CACI 4030, the
9 only -- the only question is, again, how the Court wants to
10 proceed with our third-party complaint.

11 **THE COURT:** Okay. TP Number 5? Well, 4. Is it the
12 same for 4 and 5?

13 (Pause in the proceedings.)

14 **MS. FRIEND:** Your Honor, I will just jump in quickly
15 on Number 5.

16 Given the Court's ruling on the summary judgment motion, I
17 don't know that 5 is necessary any longer.

18 **THE COURT:** Withdrawn?

19 **MS. FRIEND:** Yes, Your Honor.

20 **THE COURT:** All right. 4?

21 **MR. ATKINSON:** With respect to 4, if the Court is
22 inclined to give an instruction regarding liability for
23 indemnity, we may have a -- we may want to offer a competing
24 instruction.

25 I think the only reason we did it had to do with these

1 instructions coming out when they did, and the question of how
2 the Court wants to handle this case.

3 So we may -- if the Court doesn't mind, we may have a
4 competing instruction on this to go with the other one.

5 **THE COURT:** Okay. Let's talk about the Fifth
6 Amendment issues.

7 I laid out my position in the order for summary judgment.
8 It was obviously issued after you filed your motions in
9 limine. I do think that, to the extent that someone testified
10 during a deposition, I can't exclude their testimony on those
11 topics at trial if they didn't assert the Fifth.

12 What you have done in terms of your motions, though, is to
13 paint everything broad brush, and I can't really address it in
14 that way.

15 So, how do you want to proceed in terms of making this
16 accessible to you in order to prepare for trial?

17 **MR. NELSON:** Thank you, Your Honor.

18 So we would like guidance from the Court on these
19 particular issues.

20 And the one Your Honor just mentioned pertains to only one
21 of the defendants, Shahid Sheikh. He testified at his
22 deposition. The deposition did not finish. And when we
23 returned, which was several months later, he then asserted the
24 Fifth and wouldn't answer any more questions.

25 So I guess there's two ways to approach this. One is, as

1 Your Honor mentions, if he testified in the deposition, then
2 he would be allowed to testify at trial. The problem we have
3 with that -- the first problem is that a deposition is not
4 completed until it is completed. And we went back to some of
5 the areas, as we had intended to do, when he did set up his
6 completion, and refused to answer. So we really weren't able
7 to finish the deposition.

8 But putting that issue aside, I don't know if I would be
9 that unhappy with the thought of him testifying at trial. If
10 he's willing to testify at trial, then I'm willing at this
11 point to do that. I mean, what we said in our papers, Your
12 Honor, is true; that it prejudices the plaintiff because we
13 weren't able to find out in February what he's going to
14 testify in November. I can deal with that.

15 And so if he testifies, and is available for
16 cross-examination -- actually, if he testifies, I'm going to
17 put him on in my case-in-chief. If he's willing to now answer
18 those questions, then -- then I remove my objection with
19 regard to the Fifth Amendment and will welcome his testimony.

20 **THE COURT:** All right.

21 Response.

22 **MR. ATKINSON:** Well, Your Honor, just to be clear --
23 and it doesn't sound like it's necessarily as germane as it
24 might have been, but he testified on September 10, 2019, from
25 10:07 a.m. to 6:10 p.m., and he testified for more than five

1 hours.

2 And I do think it -- to the extent -- maybe I'm the only
3 person who thinks it's relevant at this point, the defendant
4 sought a stay --

5 **THE COURT:** Mr. Atkinson, does he intend to testify
6 in your case-in-chief?

7 **MR. ATKINSON:** Yes.

8 **THE COURT:** Okay.

9 **MR. ATKINSON:** Yes.

10 **THE COURT:** Well, then --

11 **MR. ATKINSON:** So --

12 **THE COURT:** Hold on.

13 Given that he tends to -- intends to testify in your
14 case-in-chief, he's ordered to testify in plaintiffs'
15 case-in-chief.

16 And as I hear Mr. Nelson, he is withdrawing his
17 objections.

18 **MR. NELSON:** I am, Your Honor.

19 **MS. FRIEND:** Your Honor, Kate Friend for the
20 third-party defendants.

21 I just want to raise a collateral issue, which is, the
22 fact that -- and I think this was addressed to some extent
23 when the Court discussed in our summary judgment order
24 Mr. Sheikh's supplemental declaration that the Court sustained
25 our objections to that declaration in part on the Fifth

1 Amendment grounds.

2 And I think the Court recognized that in that case it's
3 somewhat different. Because in the case of the third-party
4 defendants, you are dealing with an affirmative claim that is
5 being brought and then we have this other issue of having
6 withheld the information as to the third-party claim.

7 For that reason, we actually -- we object to Mr. Sheikh
8 testifying and we also certainly object to his deposition
9 testimony being read by the defendants.

10 It's not admissible for that purpose. He's available.

11 **THE COURT:** Well --

12 **MR. ATKINSON:** So, Your Honor --

13 **THE COURT:** Ms. Friend, the whole thing is admissible
14 as a party admission. They could read the entire deposition
15 if they wanted to under the Code of Evidence.

16 **MS. FRIEND:** Your Honor, Mr. Sheikh's counsel, I
17 don't believe, could read his --

18 **THE COURT:** But Mr. Nelson could.

19 **MS. FRIEND:** Mr. Nelson could. I think the proposal
20 from the defendants is that they intend to read Mr. Sheikh's
21 testimony.

22 **THE COURT:** They can't do that.

23 Let me be clear. If, Mr. Atkinson, if you thought you
24 were going to do that, the answer is, no, you cannot do that.
25 That's not allowed.

1 Mr. Nelson can --

2 **MR. ATKINSON:** Right.

3 **THE COURT:** -- you can't.

4 **MR. ATKINSON:** Right. No, I understand, Your Honor.

5 With regard to the third-party defendants, the issue we
6 would have there with their arguments is, the third-party
7 defendants never noticed Shahid Sheikh's deposition. Shahid
8 Sheikh, in fact, did sit for seven hours for a deposition,
9 more than five hours of which he provided substantive
10 responses. And then in the last -- less than two hours, he
11 started asserting the Fifth Amendment.

12 So there was no additional time, absent leave of court,
13 for the third-party defendants to be asking questions. And
14 I'm not going to second-guess how that went down, but the fact
15 of the matter is, the third-party defendants actually are not
16 in the same shoes as the plaintiff.

17 And so we tried to cite in our brief all of the
18 substantive questions. And it's only common sense. Cisco, in
19 the first more than five hours of Mr. Sheikh's deposition,
20 asked the critical questions of the case.

21 So, in terms of looking at this from a high level, we
22 agree, we should not be able to elicit information that he
23 refused to respond to. We can't ask him the questions that he
24 refused to answer on day two, but we do believe it would be
25 proper to stick to the substantive -- the subject areas that

1 were covered during his first five hours of deposition.

2 **THE COURT:** I guess the question is, didn't you
3 withhold documents on the basis of Fifth Amendment?

4 **MR. ATKINSON:** I don't believe so. Mr. Parkhurst can
5 speak to that further because that's an area that he was
6 working on.

7 **THE COURT:** So to the extent that you withheld
8 discovery, responses to interrogatories, anything like that on
9 the basis of the Fifth Amendment, then your argument doesn't
10 hold water.

11 **MR. ATKINSON:** Mr. Parkhurst?

12 **MR. PARKHURST:** Your Honor, we -- no documents were
13 withheld on the basis of the Fifth Amendment. The Fifth
14 Amendment assertions were in responses to interrogatories from
15 third-party defendants.

16 **THE COURT:** All right. So it would be another guide.
17 If those objections were made in response to questions
18 from the third-party defendants, you cannot affirmatively
19 solicit that information.

20 **MR. PARKHURST:** The deposition testimony in September
21 of 2019 that Mr. Sheikh gave was several months before
22 third-party defendants sent their interrogatories, which I
23 believe was springtime, March of 2020.

24 **THE COURT:** I don't know how that timing matters.
25 How does that matter? Your responses are what controls.

1 **MR. PARKHURST:** Understood, Your Honor.

2 I guess where the direction from the Court -- if he
3 testified in September of 2019 to a topic that then was
4 covered in third-party defendants' special interrogatories
5 that they sent in March, when the Fifth Amendment was
6 asserted, is his testimony from September 2019 now --

7 **THE COURT:** Well, you would have to show me an
8 example.

9 So he affirmatively testified to something and then said,
10 no, I refuse to say the same thing again? Admission once is
11 an admission period.

12 **MS. FRIEND:** As an example, Your Honor, there were
13 questions like the standard: State all facts that support
14 your claim against Ms. Uddin. But also things like state all
15 facts that support your claim that Ms. Uddin is responsible
16 for directing the counterfeiting activities.

17 And that is a question that, you know, at that point we
18 had not had an opportunity to cross-examine Mr. Sheikh and in
19 some ways that written discovery serves as the
20 cross-examination. And so -- and they refused to answer those
21 questions.

22 That's why we think that the Court should exclude that
23 testimony on the same rationale that the Court excluded
24 Mr. Sheikh's supplemental declaration.

25 **THE COURT:** And I can't do that without detail. That

1 is, I understand the issue, but you have not -- but you have
2 not proffered it to me in a sufficient detail for me to make
3 those calls.

4 I mean, I will. You understand the principle.

5 **MS. FRIEND:** Sure.

6 **THE COURT:** And that's, you know, that's part of the
7 reason to have a pretrial conference, right, so you can
8 understand the principle.

9 And now I'll put it back on your plate to figure out what
10 is the most efficient way for you all to, you know, slice the
11 issue so that you know what you are going to trial on.

12 **MS. FRIEND:** Your Honor, would you like us to submit
13 a supplemental briefing on the issue?

14 **THE COURT:** I am not -- I never encourage more
15 briefs. What you all need to do -- look, and it costs money
16 to put this stuff together. Right?

17 So what you need to figure out is, now that you have this
18 direction, is there a way that in light of the Court's
19 direction and, you know, the defendants can make any -- can
20 throw in whatever footnotes they want about maintaining their
21 objections, but in light of the Court's direction on this
22 topic, the parties agree that this is the way -- this is what
23 we are going to do.

24 Let's say there are 25 topics. We agree that, based on
25 the Court's direction, these 20 are out and these five are

1 available, or whatever.

2 If you want to go the more expensive route, you can do
3 that. But I can't -- you know, I'm just the judge. I'm not
4 the lawyers. You know this case better than I do. You know
5 the documents better than I do. You know the testimony. I
6 can't do it for you without something much more specific in
7 front of me.

8 **MS. FRIEND:** Thank you, Your Honor.

9 **MR. NELSON:** Your Honor, with regard to the topics,
10 what I understood is that the defendants were going to allow
11 Mr. Sheikh to testify with regard to questions having to do
12 with the counterfeit operation that was occurring at ADSI and
13 the assorted companies in Fremont.

14 I would intend to ask some questions about exactly that,
15 about counterfeit products being purchased, about counterfeit
16 labels being placed on products in Fremont, and all of the --
17 and all of those details.

18 I want to make certain that we are not stepping into an
19 additional problem at trial because those are the exact kind
20 of questions that he refused to testify to in February. So if
21 he's going to testify about the activities of ADSI and their
22 sales of products, where they are procuring their products and
23 the directions to the employees, that's great and I'm happy to
24 have him testify.

25 But it is not going to be a repeat of September 2019. I

1 mean, I am not constrained to just ask the very same questions
2 I asked in 2019. The topics are whether or not the defendants
3 committed the Lanham Act violations, you know, during the time
4 in question. That is the case in chief. So I would expect to
5 be able to ask questions that would cover all of that.

6 **THE COURT:** Mr. Atkinson?

7 **MR. ATKINSON:** I think, Your Honor, we will meet and
8 confer with our opposing counsel. I actually don't think
9 there's a lot of disagreement, at least as to plaintiffs and
10 defendants here. And it is mostly a matter of setting guard
11 rails so that in front of the jury we don't have problems.

12 **MR. NELSON:** The guard rail is really important, Your
13 Honor. That's what strikes me as odd as where the turn that
14 we are going here. Because the defendants --

15 **THE COURT:** Mr. Nelson, it is odd to me too.

16 **MR. NELSON:** Okay.

17 **THE COURT:** But I'm not, you know, I'm not going to
18 resolve it today. And if -- I'm happy to issue orders based
19 upon agreement. I'm happy to issue orders when something more
20 specific is proffered, and I think guard rails are important
21 for everybody. But it's still a little premature for me to be
22 doing something more specific.

23 So that deals with motion in limine 1, right, and 4,
24 right?

25 **MR. ATKINSON:** Your Honor, I think of 1 and 9 as

1 being related and 2 and 4 as being related. 2 and 4 really
2 have to do with the adverse inference instruction and what the
3 Court will allow and not allow in that regard.

4 **THE COURT:** All right. Argument on 2.

5 **MR. NELSON:** On 2, Your Honor?

6 **THE COURT:** Yes.

7 **MR. NELSON:** So we are moving party here. So our
8 motion in limine Number 2 involves the instruction that the
9 Court should give with regard to the adverse inference that
10 the jury may take on the assertion of the Fifth Amendment by
11 the various defendants.

12 The -- there is an argument, their motion Number 4, which
13 is that no adverse inference should be given. We argued in
14 our opposition there that they are misreading the law; that,
15 in fact, in federal court, in federal question cases, the
16 adverse inference is allowed. So we believe that they are
17 just wrong with regard to federal law.

18 The biggest question on Number 2 -- so with Number 2, Your
19 Honor, as you might have seen, we took great care in
20 identifying the various adverse inferences that we believe
21 should be provided.

22 So there's a variety of questions that were asked of the
23 defendants, and we have identified by the defendant, and the
24 question that was asked of the defendant and their assertion
25 of the Fifth Amendment. And then pursuant to Ninth Circuit

1 authority, we understand that we have the burden to show that
2 there's substantial evidence that supports that that, in fact,
3 is true.

4 And so what we've provided in the table that accompanied
5 motion in limine Number 2, it is the exact issues that an
6 adverse inference, we argue, is appropriate, their assertion
7 of the adverse inference, and then the evidence that supports
8 the veracity of the underlying fact.

9 And so that -- the first issue is, should an adverse
10 inference be provided? And plaintiffs argue that, yes. I
11 don't think the defendants actually are disputing that fact.

12 The second issue is when should the adverse inference
13 instruction be provided. And our argument on that, Your
14 Honor, is this is an essential part of this case in the fact
15 that the defendants, other than Mr. Sheikh, that we just
16 learned ten minutes ago may testify, the defendants are not
17 testifying. And these essential facts are not going to be in
18 front of the jury.

19 We think the jury needs to be instructed early that the
20 witnesses have chosen not to testify and -- just so that it's
21 not prejudicial to the plaintiffs. The jury may be wondering
22 why haven't we called Kamran Sheikh, or why haven't we called
23 Jessica Little as a witness.

24 And the fact is, we would love to call Jessica Little and
25 Imran Husain, et cetera as witnesses and cannot because of the

1 Fifth Amendment. So there is a balance jury instruction that
2 we provided that we are asking the Court to alert the Court
3 (sic) to that.

4 Then we believe that the case law supports, and we cited
5 the cases, but there is a paucity of authority in this area.
6 I was surprised. We couldn't find great authority that says
7 when it was that the Court should give the adverse inference
8 instruction.

9 And so our solution that we proposed to the Court was that
10 when the plaintiffs establish the underlying fact, then at
11 that point we propose that we would then turn to the Court and
12 say, for example, once underlying fact Number 8 was
13 established, which is on page 11 of 28 of Document 194, we
14 would ask the Court to then provide the jury with the adverse
15 inference that Kamran Sheikh knowingly engaged in counterfeit
16 activities involving Cisco products, a fact that he refused to
17 testify about.

18 So once there is sufficient evidence in front of the jury
19 about that, we would think it would be appropriate at that
20 point to then instruct the jury.

21 I think the defendants' option is to wait until the very
22 end of the case and then have that instruction be provided as
23 part of the closing instructions.

24 This is just too big of an issue in this case with regard
25 to -- it's the ability for the plaintiff to prove its case to

1 the jury. And the Court acknowledges that the defendant has a
2 Constitutional right to refuse to testify.

3 That comes with consequences. That comes with an
4 acknowledgment that the plaintiff, in this context, is
5 prejudiced because this is key evidence that we're not able to
6 provide to the jury.

7 I don't think it's appropriate on day seven of the trial,
8 if it goes seven days, for the very first time for the jury to
9 hear, oh, that explains why the plaintiff never brought
10 forward that evidence. I get it that the defendants asserted
11 the Fifth.

12 At that point, I believe, it's too late, Your Honor. Or
13 not too late, but people -- people get set in their ways and
14 they are now -- they are sniffing in the wrong direction and
15 they don't have the right guidance from the Court about the
16 strange circumstance here. The strange circumstance being
17 that the plaintiffs were unable to establish certain facts
18 during the course of the case, and it would only be at the
19 conclusion of the case that everything would be made clear.

20 We think that's too late.

21 **THE COURT:** Response.

22 **MR. ATKINSON:** Thank you, Your Honor.

23 In response to those points, there is no confusion over
24 the fact that an official Court can give an adverse inference
25 instruction. There is no disputing that.

1 However, I think all parties agree that that is a
2 discretionary call of the Court whether or not to give that
3 instruction.

4 And just with this notion of prejudice, we are not
5 confusing state court with federal court, but we know that
6 Your Honor had plenty of experience doing state court trials.
7 And as the court well knows, in state court, plaintiffs are
8 regularly confronted with the exclusion of Evidence Code
9 Section 913, and that state law is in play in other cases, and
10 plaintiffs move on with their case.

11 So this is not going to bring the case to a screeching
12 halt. In the first instance, we believe the Court should
13 exercise its discretion, not give the adverse inference
14 instruction, and we do believe that it should weigh into the
15 Court's thinking about this, the fact that there are
16 substantive state law issues, and state law privilege Evidence
17 Code Section 913 would not allow any of this.

18 So, that's why we believe the Court should not exercise
19 its discretion in giving the inference instruction. However,
20 in the alternative, if the Court believes there is prejudice
21 to plaintiff that needs to be offset, it's a matter of not
22 unduly prejudicing the defendants, and the plaintiffs'
23 presentation, as I read it, would have the Court instructing
24 the jury possibly as many as 52 times.

25 At least there are 52 issues set out in the exhibit

1 accompanying the motion. That would be wildly overwhelming to
2 the jury. It would really be putting the thumb on the scale
3 for the outcome to have the Court repeatedly remind the jury
4 that these people exercised their Fifth Amendment privilege
5 and did not answer these questions.

6 We're not married to the idea of a closing instruction or
7 to an introductory instruction, and we would definitely, if
8 the Court is inclined to instruct the jury, we would work with
9 the Court and counsel about what exactly that language should
10 look like. But it should not overwhelm the jury and it should
11 not overshadow the facts.

12 Cisco makes out in its motion that it has all this
13 independent evidence. It can put on its case. It does not
14 need to hammer this issue more than necessary.

15 **THE COURT:** Okay. Any other thoughts?

16 **MR. NELSON:** Your Honor, we did provide to the Court
17 in the proposed order the instruction that we suggest with
18 regard to the invocation of the Fifth Amendment right, which I
19 think is balanced and it's based on the case law.

20 With regard to discretion, the federal courts are very
21 clear that the assertion of the Fifth by a party can cause
22 significant harm to the other party. And the way to remedy
23 that is by giving this instruction.

24 It's a choice, and a choice that they can take for obvious
25 reasons and, nevertheless, it does prejudice the plaintiffs in

1 this case.

2 So we believe that the Ninth Circuit clearly authorizes
3 the Court to give the instruction. It's appropriate. The
4 witness apparently -- well, two of the defendants refused to
5 answer any questions, including their job title. Whether
6 they, in fact, were CEO of ADSI; refused to answer that
7 question.

8 So for us to be able to meet our burden to the jury to
9 establish not only that this is counterfeit, we don't need
10 their words for that, we have our own independent evidence of
11 that, but particularly whether they knew that it was
12 counterfeit, that these CBP notices were being provided, et
13 cetera, that, I think -- that is our burden to establish to
14 the jury that they did this willfully and knowingly.

15 And in order to prove willfulness and knowledge without
16 the actual testimony of the person who is allegedly willful or
17 knowing is extremely difficult and hard for the jury to piece
18 together without the instruction.

19 **MR. ATKINSON:** Your Honor, if I may?

20 **THE COURT:** Go ahead, briefly.

21 **MR. ATKINSON:** Your Honor, keeping it brief, my only
22 response to that, Your Honor, is we did move to stay this case
23 which would have alleviated, I think, a lot of the claim of
24 prejudice that the plaintiff is making out. Plaintiff opposed
25 our motion to stay the case while it was holding the -- while

1 the threat of criminal exposure persisted.

2 So, I mean, we can't replay how that went down and what
3 discovery would have developed if we had not had to assert
4 the --

5 **THE COURT:** What is the statute of limitations on
6 that?

7 **MR. ATKINSON:** I would have to go back and look, Your
8 Honor. Granted, it would have been a long --

9 **THE COURT:** I went and looked at your motion, and I
10 didn't see the actual years identified.

11 Do you not know?

12 **MR. ATKINSON:** Not off the top of my head. I
13 apologize, Your Honor.

14 **THE COURT:** Does anybody know?

15 **MR. NELSON:** It's a five-year statute, Your Honor.

16 And, Your Honor, one reason why the Court did not grant
17 the stay was -- it was at that point moot, discovery was over.
18 The assertions of the Fifth took place.

19 Usually a defendant asks for the stay before they have to
20 assert the Fifth because they don't want to assert the Fifth.
21 They already asserted the Fifth, and discovery at that point
22 was over.

23 So, if -- the motion should have been -- if the motion
24 could have been made, it should have been made earlier when it
25 would have been actually meaningful in the case. And we

1 opposed it on that basis; the fact that it was a meaningless
2 motion because discovery had completed.

3 **MR. ATKINSON:** Your Honor, plaintiff opened
4 discovery, reopened discovery, and continued discovery
5 multiple times in this case. We believe the Court would have
6 favorably heard a motion by the defendants to reopen and
7 answer the questions once a Fifth Amendment was not an issue.

8 So, I mean, these are all hypotheticals, Your Honor.

9 **MR. NELSON:** The Fifth Amendment would not be an
10 issue in 2024, Your Honor. Cisco would not consent to holding
11 this case in abeyance until 2024. I don't think it's good for
12 the Court's docket to have it there.

13 **THE COURT:** Okay. I'll have to think about what's
14 fair. So I'm not prepared to rule on those. And I'll have to
15 think about it some more.

16 I mean, I suspect, tentatively, I'll let you know, I'm
17 going to give some kind of instruction because I think
18 jurors -- I don't want them speculating. And it is -- while I
19 work hard to create a rapport with my jurors so they listen
20 and do what I tell them to do, I don't -- if I don't have to,
21 I don't make my job harder.

22 And I think that there are ways to do it that makes it
23 fair to all sides. I've just got to figure out how to get
24 that done.

25 **MR. ATKINSON:** Thank you.

1 **THE COURT:** So --

2 **MR. NELSON:** I'm sorry, Your Honor.

3 With regard to that, in the *Nationwide* case, the Ninth
4 Circuit case, the Court allowed the playing of deposition in
5 which the defendant asserted the Fifth. So the jury saw the
6 assertion of the Fifth, and the Court then gave the
7 ameliorative instruction to alert the jury that they may but
8 don't necessarily need to draw an adverse inference by that.

9 In this case, we do -- and we have included them on the
10 excerpts and videotapes that we talked about earlier today,
11 the assertions of the Fifth by Mr. Kamran Sheikh and
12 Mr. Farhaad Sheikh.

13 **THE COURT:** I don't think I'm going to have the jury
14 sit there for four hours and listen to someone taking the
15 Fifth for four hours.

16 **MR. NELSON:** It is an excerpt, Your Honor. We
17 certainly didn't include the entire deposition. That would
18 bore me too.

19 I guess that would be the question, is whether the Court
20 would allow -- how the Court is going to handle this. Because
21 if the Court is going to allow some of the assertions -- there
22 are some particularly important assertions of the Fifth that
23 if the Court were to say that we could play five minutes of
24 each one of these deponents, and then the Court giving the
25 instruction to the jury, then we would, before the trial of

1 course, make the proper selection, show it to defense counsel,
2 just so that the jury can see both the assertion and the
3 Court's --

4 **MR. ATKINSON:** Your Honor, I don't know when the
5 Court wants to hear from us on that. We won't belabor the
6 point today. We would object and we will address it when the
7 Court wants to hear from us.

8 **THE COURT:** Okay.

9 Number 3 is the only motion that I have -- well, this one
10 is on bifurcation. I tend not to bifurcate cases. I have
11 bifurcated cases when I have complicated burden-shifting
12 evidence.

13 So I did a *McDonnell-Douglas* class action. I think it's
14 very difficult for jurors to understand burden of proof and
15 who bears the burden. And so I will bifurcate so that the
16 jury clearly knows whose burden it is on phase 1. Then they
17 hear a bit more evidence and then they are told now you have
18 to -- you think differently, now the defendant has the burden,
19 and then they have to think about that piece.

20 So I've done it in circumstances where there's prejudicial
21 evidence in the second half that is totally irrelevant to the
22 first, and so I try to get a jury decision in the first phase
23 before bringing in the prejudicial evidence in the next phase.

24 But, you know, run-of-the-mill cases, right, there are
25 elements: Liability, damages, causation. You know, it all

1 gets done at the same time. I just don't see why I would
2 bifurcate.

3 Mr. Atkinson.

4 **MR. ATKINSON:** Thank you, Your Honor.

5 So, I would say, and I don't think the Court's comments to
6 say this is just a run-of-the-mill case. We believe it is
7 actually a fairly complex case. The allegations by Cisco is
8 massive counterfeiting, damages of north of \$6 million.

9 **THE COURT:** For everybody, your case is an important
10 case.

11 **MR. ATKINSON:** Right.

12 **THE COURT:** My only point is this is not -- there is
13 no burden shifting. You know, we do patent cases. We never
14 bifurcate in patent cases. Those are very complex cases.

15 The only case that gave me a headache during trial over
16 the architecture of a semiconductor chip where I was ruling on
17 objections as we went. That one gave me a headache.

18 Yes, this is a lot of money. It is not --

19 **MR. ATKINSON:** Here is where it gets complicated,
20 Your Honor.

21 There is a liability aspect to this where Cisco is
22 alleging a massive counterfeiting. And they have only
23 analyzed or examined a tiny fraction of those devices. And so
24 they are going to extrapolate for the jury using, among other
25 information, pricing data. They are going to be extrapolating

1 and trying to convince a jury what I have been calling the
2 liability phase.

3 From whatever the jury concludes in terms of liability,
4 how many devices were counterfeit, then the jury is going to
5 move to what I consider to be a very discrete phase, which is
6 tallying up the damages. And in this case, Cisco is going to
7 make an argument -- they can correct me if I'm wrong -- I
8 believe they are going to make an argument that all of those
9 sales would have enured to the benefit of Cisco if they
10 weren't allegedly counterfeit.

11 My point is, that liability phase, it's not only discrete,
12 it does bring in pricing data. It does bring in a lot of the
13 market information --

14 **THE COURT:** So let's -- okay. Keep going. I'm
15 not -- so far I'm not convinced. Because here's the other
16 thing.

17 **MR. ATKINSON:** Yes.

18 **THE COURT:** You know, I have to instruct these
19 jurors. There's -- there are economies when they can roll
20 from one topic into the next, when it is all part and parcel
21 of the whole thing.

22 To have them come out and then hear more evidence -- are
23 they going to have to hear it from the same witnesses?

24 **MR. ATKINSON:** Well, I'll give you an example, Your
25 Honor.

1 One of the critical witnesses here, I believe, for Cisco
2 is going to be their damages expert. And Cisco has stipulated
3 that the damages expert will testify only as to damages.

4 So, for Cisco's damages -- if we were to have a damages
5 phase, that person would only -- I mean, by stipulation, that
6 person is speaking to damages. The -- and it appears in
7 Mr. Regan's Footnote 1 of his expert report. He'll assume --
8 the jury has made whatever liability finding it does. We
9 believe -- in order for the jury to make a coherent and
10 reasoned decision in this case, especially given the novelty
11 of this forecasting model that Cisco intends to put in front
12 of the jury, we believe it would help the jury first to
13 conclude, well, what is the liability in this case? What
14 products or how many widgets were counterfeited, and then move
15 on.

16 It doesn't need to be a huge production. It doesn't need
17 to be a new jury impaneled. Then the jury just goes back and
18 hears a little bit more evidence about damages, which would be
19 based on the jury's liability finding. Here's that evidence
20 about damages, and then goes back and makes the next
21 determination.

22 And, Your Honor, I would not even foreclose the
23 possibility that the parties in a trial might be able to come
24 to some resolution over this case if we had some idea of where
25 a jury came down on the question of liability. Because right

1 now we have a very large damages number based on a very large
2 liability finding.

3 **THE COURT:** Okay. Any response?

4 **MS. HE:** Your Honor, Angela He on behalf of Cisco
5 here.

6 I don't -- I'll keep this short because I don't want to
7 change your position here. But here, you know, there's
8 overlapping evidence for both liability and damages. And
9 bifurcation is the exception to the rule.

10 So, here in trademark cases such as this one, evidence
11 that goes to wrongful intent to proving willfulness, for
12 example, will also be necessary to show damages and Cisco's
13 entitlement to defendants' profits.

14 So it will be burdensome for Cisco to provide
15 substantially duplicative evidence in two separate --

16 **THE COURT:** As I understood it, and I'm looking at
17 the witness list now, assuming I bifurcated, everybody comes
18 in except for Regan, right?

19 Who other than Regan would testify at the damages phase?

20 **MS. HE:** We would also like to present evidence and
21 deposition testimony from third-party witnesses, such as the
22 U.S. Army in Virginia. And that would go to show both the
23 willful infringement aspect and damages. Because they
24 purchased these products --

25 **COURT REPORTER:** I'm sorry --

1 **THE COURT:** Is that evidence in the liability phase
2 too?

3 **MS. HE:** Yes, Your Honor.

4 **THE COURT:** Who else is in both?

5 **MS. HE:** It would be other deposition deponents, such
6 as the deponent for West U.S.A. Realty.

7 **THE COURT:** Who else?

8 **MS. HE:** That's all that comes to mind currently,
9 Your Honor, but there's also other evidence that we would like
10 to show such as other evidence showing wrongful intent.

11 The seizure notices that the defendants received, the C &
12 D letters, that's all evidence that we would have to show for
13 a second trial, specially to a second jury --

14 **THE COURT:** No, no, no. There's no second jury. And
15 Mr. Atkinson kind of -- he threw something in. Maybe that
16 confused you. You never have a second jury for bifurcation.

17 You have one jury. They go, they make a decision with
18 respect to phase 1, they come back, they hear more evidence,
19 then they go back and make a decision as to phase 2. You
20 would never have a second jury. The same jury has to hear it
21 all.

22 What I am trying to understand is which of the witnesses
23 would only be for liability, which would only be for damages,
24 and which would have to testify as to both?

25 **MS. HE:** Your Honor, we would present deposition

1 testimony of the third-party witnesses of Mr. Richard Love and
2 the deponent for West U.S.A. Realty --

3 **COURT REPORTER:** Excuse me. I didn't understand
4 that.

5 **THE COURT:** Who? I didn't either.

6 **MS. HE:** Mr. Love from the U.S. Army as well as
7 deponent for West U.S.A. Realty was another third party who
8 purchased counterfeit products from defendant.

9 **THE COURT:** And then Regan.

10 **MS. HE:** And Regan. Sorry, what was that, Your
11 Honor?

12 **THE COURT:** Isn't your expert Regan?

13 **MR. BOYDEU:** Regan would testify to the damages.

14 **THE COURT:** Do the defendants have any witnesses in
15 the damages phase or just cross-examination?

16 **MR. ATKINSON:** Your Honor, our only expert would be
17 the damages expert coming in in the damages phase. So, two
18 experts. One on each side on the damages phase.

19 And it sounds like because you are denying our *Daubert*
20 motion, their expert Levy -- or Levy would come in the
21 liability phase.

22 I would point out, if there is a finding of unavailability
23 for these third parties that's scattered around the country,
24 if it's going to be deposition testimony, that would be the
25 ideal circumstance where you can have the testimony that you

1 want to use on liability, and the liability -- in other words,
2 you are not calling out people to fly out here for phase 1 and
3 then recalling them for phase 2. It would be a lot more
4 straightforward if the Court is going to allow their
5 deposition testimony to come in. That's the most streamline
6 way it would have been done anyway.

7 **THE COURT:** Okay. Tentatively it is denied.

8 I really don't -- it is just not how I try cases. And I
9 don't see huge economies of scale. And there is no -- just so
10 that you know, Mr. Atkinson, it's not surprising, most
11 defendants want me to bifurcate. That's the way it is. So, I
12 suspect if I --

13 **MR. ATKINSON:** Understood, Your Honor.

14 **THE COURT:** -- if I have Cisco as a defendant,
15 they're going to come in some day and they're going to ask me
16 to bifurcate. It's very common for defendants to ask.

17 All right. The next is evidence regarding other
18 litigation.

19 **MR. PARKHURST:** Yes, Your Honor. Andrew Parkhurst
20 for defendants.

21 This is our motion MIL 5. We are seeking to exclude --
22 there's another case that's been filed in the Northern
23 District, *Hewlett-Packard versus ADSI*. And we want to exclude
24 reference to that case. Plaintiffs have stipulated to not
25 discussing that case.

1 The third-party defendants oppose --

2 **THE COURT:** So there's a nonopposition. Why isn't
3 this coming in as a stipulation as opposed to spending time on
4 it?

5 **MR. PARKHURST:** Your Honor, I think it's not -- our
6 argument is that it shouldn't come in because it's not
7 relevant to this case. It is prejudicial. It's character
8 evidence --

9 **THE COURT:** I'm looking at Docket 205. It says, a
10 notice of nonopposition to motion in limine Number 5.
11 What's the issue?

12 **MS. FRIEND:** Your Honor, this is Kate Friend for
13 third-party defendant Nabia Uddin.

14 We filed an opposition not to -- I think we were somewhat
15 confused because the motion that we were expecting to see
16 after meet and confer was actually somewhat different than the
17 motion that was filed. And the original version of the motion
18 that came through is different than what was ultimately filed.

19 We have no intention of discussing the other Northern
20 District litigation, but as the Court is aware, there is the
21 state litigation that is going on. And I think our position
22 is really that if the Court is going to allow the State
23 litigation to come in, that we should be allowed to respond to
24 the state litigation issue --

25 **THE COURT:** So, let me tell you, generally speaking,

1 I never let evidence of other cases in.

2 So, who is asking that I admit evidence of the state court
3 case?

4 **MR. PARKHURST:** Your Honor, if I can put -- lay out
5 this topic a little more plainly.

6 So we -- originally, in what we sent to the other parties
7 in the email exchange of the initial drafts of the MIL, had a
8 slightly more broad motion that covered more topics. We
9 subsequently narrowed it down to the *HPE* litigation for
10 exclusion and didn't talk about the state court case.

11 The state court case is between the defendants who have
12 sued the third-party defendants in Superior Court in Alameda
13 County. This has to do with the trade secret misappropriation
14 and other claims along that line.

15 The reason that that would potentially come up is, the way
16 this all got started here in this case was -- at least
17 supposedly a whistleblower report from third-party defendant
18 Nabia Uddin made to -- in a call with Peter Colosi, Sideman &
19 Bancroft, Cisco's attorney.

20 That whistleblower allegation that she made to them, and
21 she's, of course, a key part of the evidence here, was made
22 after Ms. Uddin had been sued in the Superior Court case in
23 Alameda.

24 So, a part of our case is to undermine her credibility and
25 establish her bias in waiting or not making any allegations

1 against the defendants in this case until after she was sued
2 in Superior Court.

3 So to the extent --

4 **THE COURT:** It sounds -- okay. I have it. It sounds
5 like an appropriate topic on bias.

6 **MS. FRIEND:** So, Your Honor, I would say this is --
7 what I'm hearing now is actually a far more narrow version of
8 what the proposed evidence is than what we heard in meet and
9 confer. We heard a much broader proposition for what would be
10 presented.

11 And I think that there's not an issue necessarily with
12 saying, you know, that there is litigation for the purpose of
13 acknowledging that Ms. Uddin had been sued along with the
14 other third-party defendants in the case.

15 The problem is that my understanding is what they really
16 want to produce is a lot of evidence about, you know, exactly
17 what the claims are in the state court litigation.

18 **THE COURT:** I think it's appropriate to question on
19 issues of bias. I, you know, I would -- I don't see any other
20 relevant purpose for purposes of this case.

21 You know, after a couple of questions, the point is made
22 and 403 objections should be made at trial after that.

23 **MS. FRIEND:** Okay.

24 **THE COURT:** Okay?

25 **MR. KIRKE:** Your Honor, this is John Kirke. Sorry.

1 During the meet-and-confer process, it was ADSI's counsel,
2 if I understood him correctly, and you can correct me if I'm
3 wrong, said that they wanted to elicit evidence regarding the
4 manner in which the third-party defendants, now just talking
5 about Ms. Uddin, left ADSI. And I think that's a different --
6 as Ms. Friend just noted, that's a different subject than just
7 going to bias that she got sued and then called Cisco,
8 according to ADSI.

9 What we don't want --

10 **THE COURT:** Are you saying that she was terminated
11 because she -- precisely because she was sued?

12 **MR. KIRKE:** No, Your Honor -- no.

13 Your Honor, what I'm saying is, is that in this trade
14 secrets case in the state court, there are all sorts of issues
15 regarding the manner in which Ms. Uddin, third-party
16 defendants, left the company in terms of going from one
17 company to another. And I just want to make -- I want to make
18 certain we are not getting into that in this case; that we are
19 only just talking about this limited issue about getting a
20 lawsuit and then supposedly notifying Cisco as a result of
21 that lawsuit.

22 **MR. PARKHURST:** So, Your Honor, I think the -- if
23 there was confusion during meet and confer, I think it's a
24 little more limited than Mr. Kirke is -- it's for the purpose
25 of establishing bias and then to the extent -- we have to

1 establish she's been sued, the circumstances she left, she was
2 terminated for a reason, and that's another indication of bias
3 that she was terminated from her employer, a place she worked
4 at for many years and then, you know, was subsequently sued.

5 Just to the limited extent that we are discussing the
6 cause, the reason that she was terminated for cause, the
7 reasons that she was sued, we certainly don't intend to put on
8 our state case during this trial. But it is for that limited
9 purpose of establishing where she fits into this litigation
10 and where her potential bias and credibility issues arise.

11 **THE COURT:** This is what I'm going to have you do.
12 There are a number of things that you have to meet and confer
13 on.

14 And just given what's on my docket trying to get
15 everything ready in case we are going to be in trial, after we
16 are done here, which I hope is pretty soon, you are going to
17 go back and you're going to meet and confer.

18 And I want you to provide me with a proposed form of order
19 on all of these motions in limine in light of what I have told
20 you and given some of the articulation that needs to happen in
21 terms of creating those guard rails, as I think Mr. Nelson or
22 Mr. Atkinson referred to them.

23 If you don't agree, that's good for me to know. Then give
24 me your proposals as to what you think I said and, you know, I
25 guess what I -- and make sure it's in editable form.

1 And then I can have another meeting with you and I can try
2 to make sure that we are all on the same page. That's what
3 motions in limine are about. They are about all being on the
4 same page so we don't have issues come up in the midst of
5 trial.

6 So you don't have to agree with what I've decided, but
7 what's most important is that we are all on the same page and
8 that some of this stuff gets more finely articulated between
9 you all so that we know where those guard rails are and I know
10 where they are so I can enforce those agreements when we are
11 in the midst of trial.

12 Okay?

13 **MR. ATKINSON:** Thank you, Your Honor.

14 My only question in that regard is, it seems like the
15 adverse inference issue is just a little still unsettled and I
16 think the Court was going to think about what it wanted to do.

17 So I would just ask with respect to adverse inference, if
18 we can avoid getting into the weeds on that one if the parties
19 are so far apart on what they think should be done.

20 **THE COURT:** I think on that one, part of my concern
21 is that I still don't know and have from you -- well, let's
22 leave that one alone. I mean, I need to think --

23 **MR. ATKINSON:** Thank you.

24 **THE COURT:** I think I need to think about some of
25 what you've said.

1 I can tell you on that, Mr. Nelson, I am concerned with
2 this notion of instructing the jury 52 times. At a certain
3 point it does become prejudicial, an instruction by the Court.

4 One of the things I was thinking is that perhaps there's
5 an instruction at the end of every other day, or something,
6 where I can just say, you know, as the evidence has come in,
7 you should know that these are the various topics that have
8 been covered and there's -- you know, and then give the
9 adverse instruction. That way I'm instructing four times,
10 three times, not 52 times. And it's at the end of the day
11 and, you know, they can understand it.

12 Mr. Atkinson, I am concerned about waiting until the very
13 end because it's not instructive.

14 One of the things that I do -- any time -- any time I have
15 a trial where I have to give a limiting instruction, I give it
16 at the time. Because if I don't give it at the time, the jury
17 doesn't really understand it. And so, you know, those things
18 I always do in the course of the trial so that I can explain
19 it.

20 This, to me, is a little bit more like that circumstance.
21 But I take your point that 52 times is too many. I tried a
22 four-month criminal VICAR case, multiple defendants. The head
23 of the Nuestra Familia federal prison gang. I had one lawyer
24 who had not had a lot of trial experience, and this lawyer
25 refused to not object because the lawyer was afraid for

1 appellate purposes that it wouldn't be preserved. That lawyer
2 said "objection, 702" so many times through the course of the
3 trial, that when I went to talk to the jurors afterwards,
4 their first question was, what's evidence code section 702?
5 And then I explained it to them.

6 But, you know, it gets very distracting and it's not
7 instructive. So what I'm thinking about is some hybrid in
8 terms of how to do it. You know, you both made valid points.
9 I just have to figure out how to structure it.

10 **MR. NELSON:** Your Honor, if I may --

11 **MR. ATKINSON:** And what --

12 (Simultaneous colloquy.)

13 **MR. NELSON:** Sorry, Tyler.

14 That sounds sensible. I certainly was not anticipating
15 the Court instructing 52 times. So the -- that idea that the
16 Court has suggested, I think, does make sense. I would be
17 happy to meet and confer with Tyler and Andrew on that.

18 **MR. ATKINSON:** Your Honor, we will meet and confer.
19 I do think there is one piece of this that may inform the
20 Court's approach. You have four witnesses -- at its essence,
21 you have four witnesses who are not going to testify on the
22 grounds of Fifth Amendment. And so it's not like somebody --

23 **THE COURT:** And that's not -- those aren't the ones
24 I'm concerned about. Those I can easily say at the front end,
25 these --

1 **MR. ATKINSON:** Right.

2 **THE COURT:** -- you know, these witnesses, you know,
3 instruct on those ones. It's really the other where we are
4 trying to parse between testimony that you might say, if he
5 is, in fact, going to testify versus what he is not.

6 And that's important for them to understand because I let
7 jurors ask questions. What I don't want is for them to ask
8 the question, you know? Ask him this. Well, he has already
9 taken the Fifth on that, so he doesn't have to answer.

10 **MR. NELSON:** Your Honor, while on this topic, what we
11 would want to reserve is a discussion about what the adverse
12 inference is.

13 So, it's more than just the witness in general asserted
14 the Fifth, but what the Court said is, the fact he asserted
15 the Fifth as to a particular question and there is evidence
16 that that question is, in fact, true, that the jury can weigh
17 that in deciding whether to believe that fact.

18 So it is more than their decision not to testify. It's a
19 decision not to testify as to a particular fact, and the jury
20 can use that in order to favor the other side as to that
21 particular fact.

22 We can address it more fully later.

23 **THE COURT:** And that's also what closing argument is
24 about. I mean, you have -- you know, you can -- that's the
25 time where you put all of that independent evidence together.

1 And there's -- even if there's a generic inference, then you
2 can say one plus one is two, or whatever you want to argue.

3 **MR. NELSON:** Something to think about for us, but
4 is -- in closing argument, if I was allowed to say to the jury
5 that in a deposition defendant Farhaad Sheikh was asked about
6 the setting up of these remote locations to receive products
7 and refused to answer, and as you've heard from the Court
8 there's -- you can draw an adverse inference from his refusal
9 to answer that he knew that these remote locations were being
10 established, I mean, I think that's satisfactory.

11 I think that's the point I want to be able to make is to
12 draw the line between A and B; the fact that there is this
13 fact out there, they know these remote locations were being
14 established, the fact that he refused to testify about that,
15 that's what we think the Court just said the jury can draw an
16 adverse inference and refused to testify about a topic.

17 **THE COURT:** The other way to deal with that, which
18 might be a good compromise for both of you, is that you --
19 because you can't argue something that's not in evidence.
20 Right?

21 And one of the things you can do, rather than me giving,
22 Mr. Atkinson, multiple instructions, which would be
23 appropriate, is if the parties stipulated to all the responses
24 that were not given on the basis of a Fifth Amendment, and
25 that stipulation with -- you could even attach the deposition

1 transcripts -- was entered into evidence as part of the trial,
2 that stipulation doesn't have to be read to the jury. It
3 certainly doesn't have to be read word by word. We've
4 already -- we already addressed the stipulation, but as part
5 of the trial record. If it's part of the trial record, then
6 it can, in fact, be argued.

7 So, you know, that would be another way to do it. Because
8 then you could say, well, we asked him this in deposition, and
9 he took the Fifth, in your argument, even though during the
10 course of trial they are not listening to that back and forth,
11 back and forth for five hours.

12 So that would be another approach.

13 **MR. NELSON:** Understood.

14 **THE COURT:** It's a lot to think about. It may just
15 be better if you all chew on it and talk about it, and then we
16 can reconvene.

17 Gupta and Casto?

18 **MR. PARKHURST:** Yes, Your Honor. Andrew Parkhurst
19 for defendants.

20 Our motion is to exclude Mr. Casto and Mr. Gupta for not
21 being included in the initial disclosures. That's Rule 27 --
22 sorry, 37.

23 And then only disclosing -- the first time we became aware
24 of Mr. Casto and Mr. Gupta was in the expert witness
25 disclosures that Cisco served after the discovery cutoff had

1 already expired.

2 Mr. Casto has been withdrawn from the witness list.
3 However, our argument remains with him that he's the main
4 architect, person worthy -- that has the information about the
5 Risk Scoring Model. He authored a memorandum about the Risk
6 Scoring Model that was also sent to us after the discovery
7 cutoff. He was described by Mr. Williams in his deposition as
8 the lead point person on development of the Risk Scoring
9 Model.

10 So the fact that he was not disclosed to us in the time
11 period that allowed us to take his deposition and gather
12 information from him and then do follow-on further discovery,
13 had he been disclosed to us before the cutoff, we would have
14 been able to do so. That warrants his preclusion from being
15 able to offer evidence in this trial.

16 Mr. Gupta is a little different. He has not been
17 withdrawn as a witness. He is actually listed as an expert
18 witness for Cisco. Mr. Gupta's deposition was taken as an
19 expert. However, the position remains that he was not
20 disclosed until after the discovery cutoff. The disclosure --
21 expert witness disclosure states that he intends to testify
22 primarily on his percipient knowledge and factual knowledge.
23 So he is certainly somebody that we believe should have been
24 disclosed earlier in the case so we could have gathered
25 percipient testimony from him and fact testimony, and had an

1 opportunity to conduct further discovery based on that, but we
2 were not aware of him until after the fact discovery cutoff.

3 **THE COURT:** I require parties to disclose experts,
4 any nonretained person who is in-house. And I do that, and I
5 do that at the same time that the disclosures are required so
6 that I don't have problems with lawyers trying to backdoor
7 rulings with respect to their experts who are retained.

8 Where is the prejudice if you deposed him?

9 **MR. PARKHURST:** The prejudice for Mr. Casto, Your
10 Honor, is that we haven't taken his deposition and he was
11 disclosed after the fact discovery cutoff.

12 For Mr. Gupta, we did take his deposition --

13 **THE COURT:** But Casto isn't going to testify so there
14 is no prejudice because you can't -- you can't impeach
15 Mr. Gupta with Mr. Casto's testimony.

16 **MR. PARKHURST:** Your Honor, for Mr. Casto, he is
17 reserved as a rebuttal witness. Cisco has expressed numerous
18 times that they reserve the right to call him as a rebuttal
19 witness.

20 Our argument is that by not disclosing him, they should be
21 precluded from offering any evidence because this is somebody
22 who clearly -- he has been a Cisco employee for, I believe,
23 over a decade, correct me if I'm wrong, and --

24 **THE COURT:** I already ordered that no one who is not
25 on this list, 236, cannot testify.

1 **MR. PARKHURST:** I'm sorry, you cut out for the first
2 part --

3 **THE COURT:** I said, I already ordered at the
4 beginning of this hearing that anybody who is not on Docket
5 236 cannot testify. And if Mr. Casto is not on the list, then
6 per that order, he can't testify unless they come back and
7 make some kind of showing.

8 **MR. PARKHURST:** Understood, Your Honor. Then that --
9 do I understand Your Honor to mean that they can't call him as
10 a rebuttal as well?

11 **THE COURT:** Not without a motion.

12 **MR. PARKHURST:** Okay. Understood, Your Honor. Then
13 that --

14 **THE COURT:** Not only not without a motion, but with
15 time remaining.

16 You are not going to get all the time you asked for. So
17 you are going to have to be efficient. Then with respect to
18 Mr. Gupta, I don't see the prejudice.

19 **MR. PARKHURST:** Sorry, Your Honor.

20 The argument is that we did take his deposition as an
21 expert in his expert capacity. But he was disclosed -- he has
22 been a Cisco employee since 1999, I believe. He is a major
23 program director over there.

24 **THE COURT:** But so what, Mr. Parkhurst? That's my
25 point.

1 My point always is, if they are going to bring someone
2 from in-house, they have to identify him. That's what they
3 have done; so that there are no surprises, so that you did get
4 his deposition, so that there is no prejudice.

5 **MR. PARKHURST:** Your Honor, they identified him in
6 their expert witness disclosure, not in their initial
7 disclosure. That's where the prejudice -- in the expert
8 witness disclosure it states --

9 **THE COURT:** Okay. I get it, but I still -- I
10 understand the timing, but what you still haven't told me is
11 why it matters.

12 **MR. PARKHURST:** Your Honor, our argument is, because
13 he was disclosed after the fact discovery cutoff, he is
14 somebody that should have been disclosed in the initial
15 disclosures so we were denied the opportunity to take his fact
16 deposition and to follow-on discovery before the cutoff that
17 could have stemmed from --

18 **THE COURT:** But he is not testifying as a percipient
19 witness, is he?

20 **MR. NELSON:** He's not, Your Honor. He is not.

21 **THE COURT:** So -- okay. He's not. It's denied.

22 Next. Personal conduct, Number 7.

23 **MR. PARKHURST:** Yes, Your Honor.

24 So this has to do specifically with certain questions that
25 were elicited during deposition testimony and --

(Simultaneous colloquy.)

THE COURT: There's a nonopposition, Docket 206. So tell me what the issue is.

MR. PARKHURST: Your Honor, there is a nonopposition from plaintiff. Third-party defendants have opposed.

THE COURT: All right. Tell me what the issue is.

MR. PARKHURST: Yes, Your Honor.

The issue is, during deposition in this matter, specifically the deposition of Roya Sadaghiani and Theresa Lau, there were questions that were given to the deponents along the lines about drug use, about other issues that are just not pertinent or relevant to this case.

And so third-party defendants make the point that this is a relatively open-ended motion. It doesn't cite to specific evidence to exclude, and that's for the reason that --

THE COURT: Ms. Friend, what are you trying to get in?

MS. FRIEND: Your Honor, we are not trying to get in the drug use issue. We have already told defense counsel --

(Simultaneous colloquy.)

MS. FRIEND: -- testifying about that or eliciting testimony about that.

THE COURT: Granted as to drug use.

What next? What else are you talking about?

MS. FRIEND: The other issue is that there are these

1 references in here, you know, it's not really clear exactly
2 what they want to exclude, but there's some references to some
3 of this underlying -- well, we think, some of the underlying
4 state litigation issues, like the harassment issues and the
5 Labor Code violations.

6 The reason we have a concern about this is because, you
7 know, as the Court has noted earlier, we still have on --
8 despite the Court's ruling on summary judgment, we still have
9 most of the third-party defendants listed on the defendant's
10 witness list. They are apparently intending to call them.

11 The only conceivable reason that we can think of that they
12 would want to call them is going back to this issue that we
13 discussed in the last MIL, which is this idea that they want
14 to talk about how the defendants all left.

15 And we think that is irrelevant. But if the Court is
16 going to allow that in, we think that it's fair that we then
17 be permitted to discuss things like why they left.

18 **MR. PARKHURST:** Your Honor, I would -- the pushback
19 there is that the reason for filing this motion and the reason
20 that it is relatively open-ended is to try and capture -- you
21 know, the drug use questions are one thing, but there's also
22 just the possibility of opening this up into a very open-ended
23 discussion of harassment and Labor Code violations, and things
24 that have nothing to do with this case, and we are trying to
25 keep out --

1 **THE COURT:** Well, Mr. Parkhurst, I wouldn't open the
2 door. That's the issue. The question is, does the door get
3 opened?

4 **MR. PARKHURST:** Understood, Your Honor --

5 **THE COURT:** If you ask a question about, well, why
6 did you leave, and the response -- the honest response to that
7 question is, well, they're jerks and they violated, you know,
8 the -- they wouldn't pay me and they wouldn't do this and
9 wouldn't do that, that's fair game. It is fair game.

10 You can't open a door for one side and not let the other
11 side come through.

12 **MR. PARKHURST:** Yes, Your Honor.

13 I think that there is a slight distinction. I don't think
14 we would ask the question of why did you leave. The question
15 may be, did you misappropriate or take customers with you at
16 the time you left. And if the response was, well, they were
17 harassers and didn't pay me appropriately, I'm not so sure
18 that that's opening the door. That's -- making --

19 (Simultaneous colloquy.)

20 **THE COURT:** Maybe not, but you can't have -- I mean,
21 the whole point of motions in limine is to be precise for
22 specific things. You want your cake and eat it too. You want
23 to make a nice wide motion that you can cite back to the
24 parties later.

25 So, drug use, that's specific. Motion is granted.

1 If it there's something -- if there's something specific,
2 I can deal with specificity. But everybody tread cautiously
3 because if someone opens the door, I let the others come
4 through. And that's the way it works.

5 Now, don't violate my orders. If you have any inkling
6 that you might do that, we have 30 minutes every morning to
7 talk about it, and you better raise it then.

8 **MR. PARKHURST:** Understood, Your Honor. I think that
9 that's how we will have to address that, beyond the drug use.

10 **THE COURT:** So, I mean -- in terms of criminal
11 conduct, it has to be a crime of moral turpitude in order for
12 it to come in for purposes of being a basis for impeaching.
13 So you can't ask somebody just anything.

14 Again, if there's some criminal act out there in terms of
15 personal conduct that you know about, that you have certified
16 copies of their conviction, even with something like that, I
17 need to look at it in advance because certain crimes are
18 allowed for purposes of impeachment, other crimes are not.
19 It's not just any crime. It has to be a crime of moral
20 turpitude.

21 Okay. Two more. Diane, how are you doing? We have been
22 on since 1:00.

23 **COURT REPORTER:** I can do two more. I'm more than
24 happy to take a break as well, Your Honor.

25 **THE COURT:** Let me ask this: We have two more

1 motions. What else do you -- what else do we need to do
2 today?

3 **MR. PARKHURST:** Your Honor, I would say that for
4 motion in limine 9, I believe that's wrapped up in the
5 discussion that was had earlier about what to do about
6 Mr. Sheikh's testimony.

7 I think 9 has to do -- this is third-party defendants'
8 motion so they can obviously speak for it, it is more of a
9 narrow subset of motion in limine 1.

10 **THE COURT:** All right. Number 8?

11 **MR. PARKHURST:** Your Honor, there is no Number 8.
12 That was -- there was an 8, and then through the
13 meet-and-confer process, we resolved that with plaintiff and
14 reached --

15 **THE COURT:** Then there's a 10.

16 **MR. PARKHURST:** Yes.

17 **MS. FRIEND:** Number 10, Your Honor, it addresses an
18 issue that you actually ruled on in the summary judgment
19 ruling, which is that double hearsay testimony. And I think
20 that's actually the Court's ruling would apply there at this
21 point.

22 **THE COURT:** Is there anything else that we need to
23 talk about other than a date to come back?

24 **MR. PARKHURST:** Your Honor, if I could, about
25 Number 10, if there's time for more argument.

1 **THE COURT:** I have to tell you, I didn't have a hard
2 copy of 10, so I didn't look at it. Isn't -- this is to
3 exclude hearsay regarding Uddin.

4 I did -- didn't I rule on that in the summary judgment? I
5 thought I did.

6 **MS. FRIEND:** You did, Your Honor.

7 **MR. PARKHURST:** Yes, there was a ruling, Your Honor.
8 Actually -- I'll reserve on that, Your Honor. No argument is
9 necessary.

10 **THE COURT:** All right.

11 Do you want to see how much you can accomplish on your own
12 and then send me an update next Friday and let me know whether
13 there is a need to meet again?

14 **MR. NELSON:** Yes, Your Honor. I think that's a good
15 idea. From the plaintiffs, we agree.

16 **MR. ATKINSON:** We agree.

17 **THE COURT:** All right. Thumbs up everybody?

18 I see a bunch of thumbs up. Mr. Kirke?

19 **MR. KIRKE:** Thank you, Your Honor.

20 **THE COURT:** My court reporters, they love me and they
21 hate me, I think. I try to be good to them, but I do keep
22 going.

23 All right. Everybody stay safe. We will get an order out
24 on our part. I'll expect to see things back from you all
25 within one week, on the 23rd.

1 **MR. NELSON:** Thank you, Your Honor.

2 **THE COURT:** All right. We are adjourned. Thank you.

3 **MR. ATKINSON:** Thank you.

4 **MR. BOYD:** Thank you.

5 **MR. KIRKE:** Thank you.

6 (Proceedings concluded at 4:18 p.m.)

7
8 **CERTIFICATE OF REPORTER**

9 I, Diane E. Skillman, Official Reporter for the
10 United States Court, Northern District of California, hereby
11 certify that the foregoing is a correct transcript from the
12 record of proceedings in the above-entitled matter.

13
14 

15 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

16 Wednesday, October 21, 2020
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